67 (Opp.). The SooZoo pages did cause a likelihood of confusion because they used the words "Dingy Empire" and one of the pages had a cover photo stating "New Products Coming Soon." *Id.* at 5–6, 18. Plaintiffs sufficiently stated their tortious interference, trade libel, negligence claims, and CUTPA claims. *Id.* at 3–7. SooZoo's invocation of CDA immunity was misguided because the CDA was "not designed to limit any intellectual property law" claims. *Id.* at 2–3.[4] Plaintiffs attached SooZoo screenshots from three SooZoo pages, titled "Dingy Empire." *Id.* at 10–22.

SooZoo replied and reiterated their arguments. *See generally* ROA doc. 68 (Reply).

In June 2022, the district court dismissed the action, reasoning as follows. ROA doc. 78 (Or.). The federal trademark infringement claim failed because the complaint did not sufficiently allege a likelihood of confusion between the Dingy Empire trademark and the challenged SooZoo pages. *Id.* at 11. Although the screenshots showed photos of people wearing jewelry, a hat, and sweatpants, there was no likelihood of consumer confusion because none of those pages were selling clothes or jewelry. *Id.* Though one of the screenshots read "new products coming soon," there was nothing on that page explaining what products were "coming soon" or whether those products were similar to Plaintiffs' products. *Id.* at 11–12. The state law trademark infringement claim failed because Plaintiffs did not allege that they owned a trademark registered under Connecticut state law. *Id.* at 12. The tortious interference claim failed because Plaintiffs did not allege that SooZoo knew about any specific business relationship between Plaintiffs and a third party and then intentionally interfered with it. *Id.* at 5–6. At most, Plaintiffs alleged that SooZoo refused to cease a practice that was within its ability to cease, but SooZoo's refusal to grant a

[4] 47 U.S.C. § 230(e) provides that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property."

takedown request was not equivalent to interfering with a business relationship. *Id.* at 6. The trade libel claim failed because Plaintiffs did not explain how the SooZoo screenshots were defamatory or offensive. *Id.* at 7–8. The negligence claim failed because even if SooZoo had a duty to prevent trademark infringement, Plaintiffs did not plausibly allege a trademark infringement claim. *Id.* at 9. Finally, the CUTPA claim failed because it was "entirely derivative of the other claims" and since the other claims failed, so did the CUTPA claim. *Id.* at 12.

Plaintiffs timely appealed. ROA docs. 79 (6/14/2022 J.), 82 (6/22/2022 NOA).

Frankel submitted a notice of appearance, stating he would proceed pro se. ROA doc. 84 (Notice of Appearance). Frankel paid the filing fee. *See* ROA doc. 82 (Docket Entry).

III. Proceedings in this Court

In this Court, Frankel was informed that he could not appear pro se on behalf of Dingy Empire because he is not an attorney. *See* 00-0000, doc. 16 (Notice). Frankel filed a notice of appearance only on behalf of himself. *See id.*, doc. 18 (Notice of Appearance).

Frankel's brief argues that all his claims were meritorious. *See generally id.*, doc. 114 (Br.). SooZoo's brief defends the district court's dismissal of the action. *See generally id.*, doc. 120 (Br.) Frankel's reply reiterates his contentions. *See generally id.*, doc. 124 (Reply).

Discussion

I. Applicable Standards

This Court "review[s] de novo a district court's dismissal of a complaint pursuant to [Fed. R. Civ. P.] 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Kim v. Kimm*, 884 F.3d 98, 102–03 (2d Cir. 2018) (internal quotations omitted).

II. Federal Trademark Infringement Claim

"A plaintiff alleging trademark infringement in violation of the Lanham Act must demonstrate that (1) it has a valid mark that is entitled to protection and that (2) the defendant's actions are likely to cause confusion with that mark." *Hamilton Int'l Ltd. v. Vortic LLC*, 13 F.4th 264, 271 (2d Cir. 2021) (alteration and internal quotations omitted). To satisfy the second prong, "[a] plaintiff must show a probability of confusion, not a mere possibility, affecting numerous ordinary prudent purchasers." *Id.* (internal quotations omitted). This Court has "identified a non-exhaustive list of factors" to evaluate "when considering whether a mark's use is likely to cause confusion." *Id.* at 272. These factors are:

> (1) the strength of the mark; (2) the degree of similarity between the two marks; (3) the proximity of the products; (4) the likelihood that the prior owner will bridge the gap [by developing a product for sale in the market of the defendant's product]; (5) actual confusion; (6) the reciprocal of defendant's good faith in adopting its own mark; (7) the quality of defendant's product; and (8) the sophistication of the buyers.

Id. (internal quotations omitted); *accord Tiffany & Co v. Costco Wholesale Corp.*, 971 F.3d 74, 84–85 (2d Cir. 2020).

The district court correctly dismissed the federal trademark claim. Plaintiffs alleged that several SooZoo pages used Dingy Empire's mark, but Plaintiffs did not allege how those pages were likely to cause confusion. *See* ROA doc. 57 at 1–2, 4–5. Accordingly, Plaintiffs failed to satisfy the likelihood of confusion prong and insufficiently stated a federal trademark infringement claim. *See Hamilton Int'l Ltd*, 13 F.4th at 271–72.

III. Connecticut Trademark Infringement Claim

Conn. Gen. Stat. § 35-11i(a) provides a civil remedy against

> any person who . . . uses in Connecticut, without the consent of the registrant, any reproduction, counterfeit, copy or colorable imitation of a mark registered under this chapter in connection with the sale, offering for sale, distribution or advertising

> of any goods or services on or in connection with which such use is likely to cause confusion or to cause mistake or to deceive as to the source or origin of such goods or services.

Plaintiffs' Connecticut trademark infringement claim failed because they did not allege that they registered any trademark under state law. *See* ROA doc. 57 at 4–5 (providing only a federal trademark registration). Moreover, as with the federal trademark infringement claim, Plaintiffs did not adequately show how the challenged SooZoo pages were likely to cause confusion. Accordingly, Plaintiffs failed to state a trademark infringement claim under Connecticut law.

IV. Tortious Interference with Business Relations Claim

Under Connecticut law, to state a tortious interference with a business relations claim, a plaintiff must establish: "(1) a business relationship between the plaintiff and another party; (2) the defendant's intentional interference with the business relationship while knowing of the relationship; and (3) as a result of the interference, the plaintiff suffers actual loss." *Wellswood Columbia, LLC v. Town of Hebron*, 171 A.3d 409, 428 n.15 (Conn. 2017); *accord Am. Diamond Exch., Inc. v. Alpert*, 28 A.3d 976, 986 (Conn. 2011).

Plaintiffs proffered two facts in support of this claim. First, SooZoo hosted webpages with the name Dingy Empire. ROA doc. 57 at 2. Second, SooZoo allowed Plaintiffs' webpage "to be corrupted or infiltrated by others such that when potential customers clicked on the Dingy Empire page, they were diverted to disturbing images of false content, videos, and websites, which were unrelated to and were harmful to the Plaintiffs' business reputation and image." *Id.* However, Plaintiffs did not proffer any facts showing that SooZoo knew about any specific business relationship between Plaintiffs and a third party, and knowing of that relationship, intentionally interfered with it. Although Plaintiffs "repeatedly asked" SooZoo to take down those pages, *id.*,

SooZoo's ignoring of takedown request does not amount to intentional interference, *Wellswood Columbia, LLC*, 171 A.3d at 428 n.15. Accordingly, Plaintiffs failed to state a tortious interference claim.

V. Trade Libel Claim

Under Connecticut law, trade libel is "a species of defamation," which requires a "damaging statement . . . that disparages a person's goods or services [and is] made 'of and concerning' the person stating the cause of action." *Qsp, Inc. v. Aetna Cas. & Sur. Co.*, 773 A.2d 906, 917–18 (Conn. 2001).

Plaintiffs alleged that the SooZoo webpages containing the words "Dingy Empire" were "defamatory of the Plaintiffs' legitimate business in that they charge improper conduct or a lack of skill or integrity in one's business and is of such a nature that it is calculated to cause injury to one in its profession or business" and that the screenshots were "offensive and harmful to the Plaintiffs' business" because "they in no way represent the Plaintiffs' actual business operations and [were] offensive to the customers." ROA doc. 57 at 3. However, these allegations were insufficient to state a trade libel claim. Plaintiffs proffered no facts in support of these allegations. *See id.* Plaintiffs did not explain how the screenshots were defamatory or offensive. *See id.* Finally, Plaintiffs did not explain why other SooZoo pages using the name "Dingy Empire" and containing posts by third parties meant that SooZoo had made a "statement." *See id.* Accordingly, Plaintiffs failed to state a trade libel claim.

VI. Negligence Claim

Under Connecticut law, to state a negligence claim, a plaintiff "must establish duty; breach of that duty; causation; and actual injury." *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 127 (2d Cir. 2013) (internal quotations omitted); *accord Raspberry Junction Holding, LLC v. Se. Conn.*

Water Auth., 263 A.3d 796, 804 (Conn. 2021).

Plaintiffs claimed that SooZoo "owe[d] a duty to the Plaintiffs to not allow its trademark to be interfered with." ROA doc. 57 at 3. However, even if SooZoo did owe Plaintiffs a duty to prevent third parties from infringing on Plaintiffs' trademark, Plaintiffs did not plead a breach, as Plaintiffs failed to plausibly allege a trademark infringement. *See supra* Parts II, III. Accordingly, Plaintiffs inadequately stated a negligence claim.

VII. Connecticut Unfair Trade Practices Act Claim

CUTPA prohibits any person from "engag[ing] in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a). CUTPA provides a private cause of action for "[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment" of an unfair or deceptive act. Conn. Gen. State. § 42-110g(a); *see Dane v. UnitedHealthcare Ins. Co.*, 974 F.3d 183, 189–90 (2d Cir. 2020). "An ascertainable loss is a loss that is capable of being discovered, observed or established." *Dane*, 974 F.3d at 190 (quoting *Fairchild Heights Residents Ass'n v. Fairchild Heights, Inc.*, 82 A.3d 602, 620 (Conn. 2014)).

Plaintiffs CUTPA claim merely incorporated the allegations they raised in their other claims and then alleged that "[t]he actions of the Defendant as aforesaid which are continuing and ongoing constitute a violation of CUTPA for which the Plaintiffs ha[ve] suffered damages which are or may be quantifiable in that its actions have created confusion in the marketplace." ROA doc. 57 at 5–6. Plaintiffs inadequately pleaded a CUTPA claim. Plaintiffs did not establish any deceptive acts or practices. At most, they alleged that SooZoo "created a confusion in the marketplace." *Id.* at 6. However, as explained *supra*, Plaintiffs did not show how the other pages titled "Dingy Empire" were likely to cause any confusion. Additionally, Plaintiffs failed to allege

an "ascertainable loss," *Dane*, 974 F.3d at 190, as the operative complaint acknowledged that their damages "may be unquantifiable," ROA doc. 57 at 6. Accordingly, Plaintiffs failed to state a CUTPA claim.

VIII. Leave to Amend

This Court "review[s] the district court's denial of leave to amend for abuse of discretion." *Kim*, 884 F.3d at 105. The district court did not abuse its discretion by denying Plaintiffs' motion to reamend. ROA doc. 71. The proposed amended complaint raised the same factual allegations as the operative complaint and the district court treated the exhibits that were attached to the proposed amended complaint as incorporated into the operative complaint. Accordingly, leave to amend was appropriately denied as futile. *See Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993) (per curiam).

Conclusion

Accordingly, the Court should affirm the judgment.

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Writing Sample

The attached writing sample consists of a bench memorandum I drafted in my capacity as a law clerk at the Staff Attorney's Office, United States Court of Appeals for the Second Circuit. The factual details discussed throughout this sample, including names, dates, and citations to the record have been altered to maintain the privacy of the parties and to retain the integrity of the court. Furthermore, this sample has been edited by my supervisor, Catherine J. Minuse, whom I work closely with daily.

Issue Raised and Recommendation

Issue: Daniel Jager, pro se, appeals the dismissal of his action against the Commodity Futures Trading Commission, Reparations Program ("CFTC") and the National Austrian Bank, LTD ("NAB"). In May 2021, Jager filed a diversity action against the CFTC and NAB. The district court granted NAB's motion to dismiss for lack of personal jurisdiction because NAB was not subject to general or specific jurisdiction in New York. The district court also sua sponte dismissed Jager's claims against the CFTC for lack of subject matter jurisdiction, citing sovereign immunity. The district court did not clarify if the dismissal was without prejudice. The issue is whether to affirm the judgment.

Recommendation: Affirm the judgment, but remand to the district court to amend the judgment to reflect that the dismissal was without prejudice.

Background

I. District Court Proceedings

In May 2021, Jager sued the CFTC and NAB, alleging as follows. Record on Appeal ("ROA") doc. 1 (Compl.). NAB had "custodianship" over what Jager calls his "capital fund assets" and had wrongly refused to return the funds to him. *Id.* at 5. Instead, NAB had provided "access to unauthorized and illegal operative retail forex [i.e., foreign exchange] merchant dealers

[who] affirmed to be non-compliance registered solicitors in violation of the United States Commodity Exchange Act." *Id.* NAB "intend[ed] to designate the cause of an investment forex scam as the sole illegal beneficiary and claimant of [Jager's] own personal equity funds." *Id.* Jager had brought a proceeding before the CFTC, in which a judgment officer determined that Jager had failed to establish that NAB violated the Commodity Exchange Act or CFTC regulations. *See id.* at 5–6.

In the action underlying this appeal, subject matter jurisdiction was grounded in diversity of citizenship because Jager was a Florida domiciliary, the CFTC had a Washington, D.C., address, and NAB was incorporated in Vienna, Austria, and had a "principal place of business in New York City." *Id.* at 2–4, 8. He identified the "[p]lace(s) of occurrence" as "Miami, Florida." *Id.* at 5. He sought compensatory, punitive, and restitution damages. *Id.* at 6.

Jager attached fifteen documents to his complaint. As relevant here, they clarify as follows. In 2013, Jager opened a forex account with ABC Markets, Ltd with $7,500. ROA doc. 1-15 (Ex.) at 6. NAB was the depository for ABC Markets. *Id.* at 7. Jager traded in that account until 2016 and allegedly suffered $117,687.13 in trading losses. *Id.* at 6. In May 2017, Jager commenced what the CFTC calls a "voluntary decisional procedure" with the CFTC, alleging that NAB "breached some duty in accepting ABC Markets' deposits" and that NAB was liable for the full amount of his trading losses. *Id.* at 7–8. The "voluntary decisional procedure" form stated that "[b]y electing the voluntary procedure, you will waive your right to appeal." *Id.* at 8. The CFTC dismissed the voluntary procedure complaint and subsequently denied reconsideration because Jager failed to state a claim under the Commodity Exchange Act or its accompanying regulations. *See id.* at 10.

The district court issued summonses as to the CFTC and NAB. ROA docs. 9, 10

(Summonses). Jager filed affidavits of service, which showed that he sent summons to the CFTC in Washington, D.C., and "to the Office of the Attorney General (OAG) for the District of Columbia" and that he had a process server serve NAB in Vienna, Austria. ROA docs. 11 at 1; 12 (Affidavits).

In August 2021, NAB moved to dismiss the complaint for lack of personal jurisdiction. ROA doc. 24 (Mot.). NAB attached a declaration from its general counsel, stating that NAB was incorporated in Vienna, Austria, and that it maintained its headquarters there. ROA doc. 26 (Decla.) at 2. The general counsel noted that NAB maintained a single office in the United States, which was located in New York City. *Id.*

NAB argued as follows. NAB was not subject to general jurisdiction in New York because NAB was incorporated in Austria and its principal place of business, i.e., the place where its officers direct, control, and coordinate its activities, was also in Austria. ROA doc. 25 (Mem.) at 7. NAB was not subject to specific jurisdiction in New York because Jager did not allege that NAB had any suit-related contacts with New York. *Id.* at 8–9. Jager's complaint had listed the "place[] of occurrence" as "Miami, Florida" and NAB's alleged conduct, serving as ABC Markets' depository, was unconnected to New York. *Id.*

Jager opposed, arguing that NAB had a "principal office" in New York City. ROA doc. 28 (Opp.) at 1. NAB replied and acknowledged that it had an office in New York City but stated that it was not its principal place of business. ROA doc. 29 at 5.

In February 2022, the district court granted NAB's motion to dismiss and sua sponte dismissed Jager's claim against the CFTC. ROA doc. 31 (Or.). Jager had failed to allege personal jurisdiction over NAB. *Id.* at 3–4. Since NAB was neither headquartered nor incorporated in New York, New York did not have general jurisdiction over NAB. *Id.* at 4. Because Jager did not

allege any conduct that occurred in New York, New York had no connection to his litigation, and there was no specific jurisdiction over NAB. *Id.* Sua sponte dismissal over Jager's claim against the CFTC was warranted because the CFTC's Reparations Program was administered by a federal agency, which was entitled to sovereign immunity, and sovereign immunity implicated the court's subject matter jurisdiction. *Id.* at 4–5. The district court did not clarify if the dismissals were without prejudice. *See generally id.*; ROA doc. 32 (J.).

Jager timely appealed. ROA docs. 32 (2/18/2022 J.), 33 (4/6/2022 NOA); *see* Fed. R. App. P. 4(a)(1)(B)(ii) (providing 60 days to appeal when "a United States agency" is a party).

II. Proceedings in this Court

The appeal is fully briefed. Jager argues as follows. 2d Cir. 00-0000, doc. 23 (Br.). NAB is subject to personal jurisdiction in New York because it "conducted substantial business in the United States by and through its New York office" and NAB's "principal and only place of business in the United States is its Manhattan, New York office." *Id.* at 15–16. Sovereign immunity was inapplicable to his claim against the CFTC because the Administrative Procedure Act authorized him to seek review of the CFTC's administrative determination in the district court. *Id.* at 19–21.

The CFTC argues that the district court correctly sua sponte dismissed Jager's claim against it for lack of subject matter jurisdiction. *Id.*, doc. 31 (Br.) at 6. The CFTC also argues that it was never served in compliance with Fed. R. Civ. P. 4(i). *Id.* at 6–7. Rule 4(i) required Jager to serve the United States Attorney for the district in which he filed the action and the United States Attorney General, but Jager never obtained summons for them. *Id.* at 7. However, there is no need to allow Jager another opportunity to properly serve the CFTC "merely to have this case boomerang back to this Court." *Id.* Instead, the Court should affirm on sovereign immunity

grounds. *Id.*

NAB defends the district court's dismissal for want of personal jurisdiction. *See generally id.*, doc. 35 (Br.).

Jager's reply reiterates his contentions and adds as follows. *Id.*, doc. 38 (Reply). The CFTC's failure to appear "was not due to [his] not filing proof of service of process," but rather, its own "negligence" and that "the notion of sovereign immunity has no actual applicability" to this case. *Id.*, doc. 27 (Opp.) at 1–2.

The CFTC has filed a sur-reply, arguing that Jager's assertion that he properly served the CFTC was incorrect. *Id.*, doc. 39 (Reply). On May 11, 2021, Jager requested a summons addressed to the CFTC and on June 14, 2021, Jager filed an affidavit of service, in which he purported to have mailed copies to the CFTC and the "Office of the Attorney General (OAG) for the District of Columbia." *Id.* at 1–2.

Discussion

I. Applicable Standards

When reviewing a district court's dismissal of a complaint for lack of personal jurisdiction, lack of subject matter jurisdiction, and under sovereign immunity, this Court reviews the legal conclusions de novo and factual findings for clear error. *See Beaulieu v. Vermont*, 807 F.3d 478, 483 n.1 (2d Cir. 2015) (subject matter jurisdiction and sovereign immunity); *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 128 (2d Cir. 2013) (personal jurisdiction).

II. Subject Matter Jurisdiction/Sovereign Immunity

The district court correctly dismissed Jager's claim against the CFTC for lack of subject matter jurisdiction. "Issues of federal sovereign immunity implicate a court's subject-matter jurisdiction." *Springfield Hosp., Inc. v. Guzman*, 28 F.4th 403, 415–16 (2d Cir. 2022). "The

plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Cooke v. United States*, 918 F.3d 77, 80 (2d Cir. 2019) (internal quotations omitted).

Federal agencies are entitled to sovereign immunity because an action against a federal agency "is essentially a suit against the United States." *Robinson v. Overseas Mil. Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994). "The United States, as sovereign, is immune from suit unless it waives immunity and consents to be sued." *Cooke*, 918 F.3d at 81. Such "a waiver must be 'unequivocally expressed in the statutory text.'" *Id.* (quoting *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999)). This Court "must strictly construe matters concerning the waiver of sovereign immunity in favor of the government." *Id.* at 80 (citing *United States v. Sherwood*, 312 U.S. 584, 590 (1941)).

Congress has not expressly waived sovereign immunity for the CFTC or its Reparations Program. To the contrary, Congress delegated the issue of waiver to the CFTC. Congress stated that the CFTC "may promulgate such rules, regulations, and orders as it deems necessary or appropriate," which "may prescribe, or otherwise condition, without limitation, . . . rights of appeal, if any." Futures Trading Act of 1982, Pub. L. No. 97-444, § 231(2), 96 Stat. 2294, 2319 (codified at 7 U.S.C. § 18(b)); *see* 7 U.S.C. § 1a(8) (defining "Commission" as CFTC). Congress also stated that "[a]ny order of the [CFTC] entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States *Court of Appeals* for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located." Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 106, 88 Stat. 1389, 1394 (codified as amended at 7 U.S.C. § 18(e)) (emphasis added).

The Code of Federal Regulations provides three alternative forms of reparations proceedings: a "voluntary decisional proceeding," a "summary decisional proceeding," and a

"formal decisional proceeding." 17 C.F.R. § 12.26(a)–(c). The Regulations provide that a voluntary proceeding is final and unappealable. 17 C.F.R. § 12.106(d) ("[A] final decision may not be appealed to a U.S. Court of Appeals . . . ."). The summary and formal proceedings are appealable to the Court of Appeals. *See* 17 C.F.R. §§ 12.210(e), 12.314(e).

In this case, Jager commenced a voluntary decisional proceeding. *See* ROA doc. 1-15 at 8. Therefore, under 7 U.S.C. § 18(b) and 17 C.F.R. § 12.106(d), the CFTC's decision was not appealable. Accordingly, neither Congress nor the CFTC has waived CFTC's right to sovereign immunity. *Cooke*, 918 F.3d at 81. Even if Jager had commenced a summary or formal proceeding, or if 17 C.F.R. § 12.106(d) were invalid or unconstitutional, *see Myron v. Hauser*, 673 F.2d 994, 1008 (8th Cir. 1982) (entertaining a Seventh Amendment challenge to CFTC's Reparations Program and holding "that the [S]eventh [A]mendment does not require jury trial upon demand in reparation proceedings before the CFTC"), Jager improperly commenced his action in the *district* court rather than the *Court of Appeals*. *See* 7 U.S.C. § 18(e).

Jager's claim that sovereign immunity is inapplicable based on the Administrative Procedure Act, 5 U.S.C. § 702 is misguided. The Administrative Procedure Act's definitions provide that the Administrative Procedure Act "applies . . . except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). In this case, the applicable statute, 7 U.S.C. § 18(b), delegated to the CFTC the power to determine if reparations proceedings are subject to judicial review, and the CFTC elected to make its voluntary decisional proceeding not subject to judicial review, 17 C.F.R. § 12.106(d). Therefore, the Administrative Procedure Act is inapplicable. Although *Clark v. CFTC*, 170 F.3d 110 (2d Cir. 1999), held that the Administrative Procedure Act did allow judicial review of a CFTC proceeding, the proceeding at issue in that case was a "disciplinary proceeding" under 7 U.S.C.

§ 12c(c), which expressly provides that CFTC *disciplinary* actions are "[s]ubject to judicial review." However, Jager's CFTC's proceeding was a reparation proceeding, rather than a disciplinary proceeding, and it was subject to 7 U.S.C. § 18, rather than 7 U.S.C. § 12.

Accordingly, the district court correctly concluded that the CFTC is entitled to sovereign immunity.[1]

III. Service of Process

Alternatively, the Court can affirm the dismissal as to the CFTC for failure to effect service of process. Fed. R. Civ. P. 4(i)(2) provides that in order "[t]o serve a United States agency . . . , a party must serve the United States and also send a copy of the summons . . . to the agency." To serve the United States, a party must serve "the United States attorney for the district where the action is brought" and "the Attorney General of the United States at Washington, D.C." Fed. R. Civ. P. 4(i)(1)(A)–(B). Further, Fed. R. Civ. P. 4(m) provides that "[i]f a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time."

Here, Jager requested a summons for the "COMMODITY FUTURES TRADING COMMISSION REPARATIONS PROGRAM," ROA doc. 5, the district court ordered service on the same, ROA doc. 7, the issued summons reflected the same, ROA doc. 9, and Jager's affidavit of service reflected that he sent the summons to the CFTC in Washington, D.C., and "to the Office of the Attorney General (OAG) for the District of Columbia," ROA doc. 11 at 1. Accordingly, Jager did not serve the "the United States attorney for the district where the action is brought," i.e.,

[1] In 2018, a panel of the Court sua sponte dismissed an appeal of a district court order that had dismissed an action against the CFTC on sovereign immunity grounds. *See Hotra Suarez v. CFTC*, 2d Cir. 18-1511, doc. 54 (Mot. Or.), S.D.N.Y. 18-cv-2983, doc. 5 (Or.).

the U.S. attorney for the Southern District of New York, or the *U.S.* Attorney General. Rather, he served the Attorney General for the District of Columbia, which is a different entity. Fed. R. Civ. P. 4(i)(1)–(2). Since Jager filed his action on May 11, 2021, ROA doc. 1, he had 90 days, until August 9, 2021, to complete service of process on the CFTC. *See* Fed. R. Civ. P. 4(m). Having failed to do so, the district court was required to dismiss the action against the CFTC. *See id.*

IV. Personal Jurisdiction

The district court correctly determined that NAB was not subject to personal jurisdiction in New York. To exercise personal jurisdiction "over a person or an organization, such as a bank, that person or entity must have sufficient 'minimum contacts' with the forum 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 134 (2d Cir. 2014) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Federal courts may assert personal jurisdiction under two theories: general jurisdiction or specific jurisdiction. *Id.*

A. General Jurisdiction

A corporation is subject to general jurisdiction in the place where it is rendered "at home," i.e., its place of incorporation and its principal place of business. *Daimler AG v. Bauman*, 571 U.S. 117, 122, 137 (2014). A corporation's principal place of business is its "nerve center," i.e., "the place where a corporation's officers direct, control, and coordinate the corporation's activities," which "should normally be the place where the corporation maintains its headquarters." *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010).

NAB is incorporated in Vienna, Austria, *see* ROA doc. 26 (Decla.) at 2, and its headquarters, the place where its officers direct, control, and coordinate its activities, is also in Vienna, Austria, *see id.*; ROA doc. 26 at 7. Although NAB maintains an office in New York City,

the New York City office is not NAB's principal place of business. *See* ROA doc. 26 at 2. Therefore, NAB is not subject to general jurisdiction in New York. *Daimler*, 571 U.S. at 137.

B. Specific Jurisdiction

Specific jurisdiction "permits adjudicatory authority only over issues that 'arise out of or relate to the entity's contacts with the forum.'" *Gucci*, 768 F.3d at 134 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)).

Jager has not alleged any conduct arising out of New York. *See generally* ROA doc. 1. In fact, Jager identified "Miami, Florida" as the "[p]lace[] of occurrence." *Id.* at 5. Accordingly, the district court correctly dismissed the action, as to NAB, for lack of personal jurisdiction.

V. Dismissal Should Have Been Without Prejudice

The district court did not clarify if its dismissal of Jager's claims was without prejudice. *See* ROA docs. 31, 32. A dismissal for lack of subject matter jurisdiction is a dismissal without prejudice. *See SM Kids, LLC v. Google LLC*, 963 F.3d 206, 212 n.2 (2d Cir. 2020) (explaining that "[w]here a court lacks subject matter jurisdiction, it also lacks the power to dismiss with prejudice" (quoting *Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 123 (2d Cir. 1999))); *see, e.g.*, *Shields v. United States*, 858 F. App'x 427, 428–29 (2d Cir. 2021) (Summary Order) (affirming a dismissal for lack of subject matter jurisdiction predicated on sovereign immunity and remanding for entry of an amended judgment dismissing the case without prejudice); *Leytman v. United States*, 832 F. App'x 720, 721–22 (2d Cir. 2020) (Summary Order) (same). Additionally, a dismissal for want of personal jurisdiction is also a dismissal without prejudice. *See Elfenbein v. Gulf & W. Indus., Inc.*, 590 F.2d 445, 449 (2d Cir. 1978) (per curiam) (observing that whether a dismissal is with or without prejudice refers to the "[r]es judicata effect of a dismissal"), *overruled on other grounds by Espinoza ex rel. JPMorgan Chase & Co. v. Dimon*, 797 F.3d 229,

236 (2d Cir. 2015); *Saylor v. Lindsley*, 391 F.2d 965, 968 (2d Cir. 1968) (explaining that "at common law, a dismissal on a ground which did not resolve the substantive merit of the complaint was not a bar to a subsequent action on the same claim" and that "a dismissal for lack of jurisdiction or for improper venue" is not an adjudication on the merits); *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 221 (2d Cir. 1963) ("A dismissal for lack of jurisdiction or improper venue does not preclude a subsequent action in an appropriate forum, whereas a dismissal for failure to state a claim upon which relief can be granted is with prejudice."); *see also Smith v. United States*, 554 F. App'x 30, 32 n.2 (2d Cir. 2013) (Summary Order) ("[A] dismissal for want of personal judication is without prejudice." (citing *Elfenbein*, 590 F.2d at 449)).

Accordingly, the Court should remand with instructions to the district court to amend the judgment to clarify that the dismissal was without prejudice.

Conclusion

For the foregoing reasons, the Court should affirm the judgment but remand with instructions that the district court amend its judgment to reflect that the dismissal was without prejudice.

Applicant Details

First Name	**Beatrice**
Middle Initial	**P.**
Last Name	**Rubin**
Citizenship Status	**U. S. Citizen**
Email Address	**beatrice.rubin@brooklaw.edu**
Address	**Address** Street **3900 14th Street NW, Apartment 308** City **Washington** State/Territory **District of Columbia** Zip **20011** Country **United States**
Contact Phone Number	**6105855563**

Applicant Education

BA/BS From	**McGill University, Canada**
Date of BA/BS	**May 2014**
JD/LLB From	**Brooklyn Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23302&yr=2009**
Date of JD/LLB	**May 10, 2024**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Brooklyn Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Moot Court Appellate Division** **Vis International Commercial Arbitration Moot**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Bernstein, Anita
anita.bernstein@brooklaw.edu
718-780-7934
Gora, Joel
joel.gora@brooklaw.edu
718-780-7926
Askin, Jonathan
jonathan.askin@brooklaw.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

BEA RUBIN
170 Atlantic Avenue, Apartment 3, Brooklyn, NY 11201
(610) 585-5563 | beatrice.rubin@brooklaw.edu

The Honorable Stefan R. Underhill
United States District Court, District of Connecticut
Brien McMahon Federal Building United States Courthouse
915 Lafayette Boulevard, Suite 411
Bridgeport, Connecticut 06604

Dear Judge Underhill:

I am applying for a 2024-2026 clerkship with your chambers. I am a third-year student at Brooklyn Law School, where I serve as the Executive Notes Editor of the *Brooklyn Law Review*. As your clerk, I will contribute the skills I have developed as a summer associate, judicial intern, research assistant, and marketing and communications strategist: my strong work ethic, ability to work well under pressure, and unwavering positive attitude I bring to every team.

Prior to law school, I worked for seven years in the music industry at Atlantic Records and as a marketing and communications strategist with brands such as Ford Motor Company. These experiences taught me how to manage stressful situations, competing deadlines, and demanding clients and bosses. I developed the ability to proactively find solutions in challenging circumstances with limited guidance.

In law school, I have developed strong legal research and writing skills. Last summer, I had the privilege of interning for Judge Ann Donnelly in the Eastern District of New York, where I gained invaluable insights into the inner workings of a clerk's role. I closely collaborated with the clerks to draft proposed orders for Judge Donnelly's review. As a research assistant for Professor Anita Bernstein, I have provided comprehensive research for her upcoming trade book relating to both legal and medical subjects. These experiences have deepened my ability to analyze complex legal questions with clarity and precision.

Presently, I am a summer associate at Cadwalader, Wickersham & Taft. I work closely with partners and associates on white-collar investigations and anti-trust matters to conduct in-depth research and draft memoranda. I also have been deeply committed to pro bono work, including providing legal assistance to domestic violence and human trafficking survivors.

These diverse experiences have inspired my strong interest in pursuing a clerkship, and I cannot envision a more worthy start to my legal career than serving as a law clerk for a federal judge. With family ties in New Haven, the chance to clerk for your chambers resonates deeply with me and presents an opportunity to give back to the Connecticut legal community.

Enclosed with this application, you will find my resume, unofficial transcript, and a writing sample. Brooklyn Law School will submit my recommendations from Professors Joel Gora, Anita Bernstein, and Jonathan Askin. Should you require any additional information, please do not hesitate to contact me.

Thank you for your consideration. I look forward to hearing from you.

Sincerely,

Beatrice (Bea) Rubin

BEA RUBIN

170 Atlantic Avenue, Apartment 3, Brooklyn, NY 11201 | (610) 585-5563 | beatrice.rubin@brooklaw.edu

EDUCATION

Brooklyn Law School, Brooklyn, NY
Candidate for Juris Doctor May 2024
Rank: Top 5% (GPA: 3.864)
Honors: *Brooklyn Law Review*, Executive Notes Editor; Moot Court Honor Society, Appellate Division (Philip C. Jessup International Law Moot; Vis International Commercial Arbitration Moot); Dean's List 2021-2022
Awards: Prince Scholarship; Charles M. & Anita K. Lee Scholarship; Dennis J. Block International Business Law Fellowship; CALI Excellence for Future Award in International Law

McGill University, Montreal, Quebec
Bachelor of Arts in English June 2014
Activities: Canvas Magazine*, Editor*; Art History Communications Studies Student Association, *Vice-President*; Arts Undergraduate Society*, Orientation Leader*

EXPERIENCE

Cadwalader, Wickersham & Taft, Washington, DC
Summer Associate May 2023 – July 2023
Research case law, statutes, and regulations, and draft memoranda relating to anti-trust and white collar issues. Provide pro bono legal services for Sanctuary for Families and Amara Legal name change clients.

Brooklyn Law Incubator & Policy ("BLIP") Clinic, Brooklyn, NY
Clinic Intern January 2023 – May 2023
Led telecommunications, Internet, and right to travel policy efforts. Drafted privacy policies for medical startups and social media companies. Researched Torture Victim Protection Act and international human rights case law. Developed presentations and media outreach materials for technology and startup clients.

Hon. Ann M. Donnelly, United States District Court for the Eastern District of New York, Brooklyn, NY
Judicial Intern June 2022 – July 2022
Reviewed documents and court materials, researched precedent, and drafted two court orders regarding social security issues. Observed daily hearings. Met with clerks to discuss cases on Judge's docket.

Professor Anita Bernstein, Brooklyn Law School, Brooklyn, NY
Research Assistant September 2021 – Present
Conduct medical and sociological research for Torts Professor Anita Bernstein's upcoming trade book relating to regulations around the male reproductive process and sexually transmitted infections.

Civic Entertainment Group, New York, NY
New Business and Strategy Senior Manager April 2019 – May 2021
Manager April 2018 – April 2019
Senior Coordinator April 2017 – April 2018
Led and advised research, strategy, creative, and account/project management, working with the office of the CEO and Head of Communications for Fortune 50 company. Developed narrative and storytelling platforms for internal and external audiences to convey CEO and leadership's vision of company's purpose, mission, and strategy. Oversaw C-level executive's community engagement and social strategy. Crafted LinkedIn posts that averaged 20K+ views, 700+ likes. Maintained ongoing relationships and partnerships with public and private sector including media companies, brands, community organizations, and city/state government (e.g., Fast Company, VICE, TED, CityLab, Better Block, Spin Scooters, Argo.AI). Identified and supervised partnerships and artist talent onsite for events. Managed coordinators and internal and external support staff for project execution. Developed initiatives to amplify underrepresented voices at Civic. Collaborated with Civic CEOs on new business opportunities. Engaged in new client outreach and development of contracts, scopes, and pitch decks. Managed external consultants.

Atlantic Records, New York, NY
Promotion Coordinator July 2016 – April 2017
Promotion Assistant July 2014 – July 2016
Produced listening events for 200+ clients supporting Grammy-award-winning album launches. Orchestrated events and artist interviews with radio conglomerates. Collaborated with radio and artist management to fulfill show/appearance contracts and riders.

VOLUNTEER EXPERIENCE

Brooklyn Public Library, Brooklyn, NY, *Brooklyn Eagles Leadership Committee* July 2017 – Present
Pincus Family Foundation, Philadelphia, PA, *NextGen Pincus Family Foundation Board Member* November 2017 – Present

LANGUAGE SKILLS AND INTERESTS

Proficient in French. Former colonial reenactor. Interests include collecting vinyl records, hiking, and traveling (last visited: Tunisia).

Print Date: 06/11/23

Ms. Beatrice P. Rubin
170 Atlantic Ave.
Apt. 3
Brooklyn NY 11201

Student Name: Beatrice P Rubin
Student ID..: 0426513
Class: 2F

			Courses	Cred Att	Grd	Grad Crs	GPA Calc	Faculty
			Summer 2021					
TRT	100	D1	Torts	4.00	A-	4.00	14.68	A. Bernstein
Sem GPA 3.670			Cum GPA 3.670	4.00		4.00	14.68	
			Fall 2021					
LGE	125	D1	Legal Profession	3.00	A	3.00	12.00	C. Godsoe
CRM	100	D2	Criminal Law	4.00	A	4.00	16.00	A. Ristroph
CPL	102	D2	Civil Procedure	4.00	A	4.00	16.00	J. Ressler
LWR	100	D15	Legal Research & Writing	3.00	A	3.00	12.00	H. Gilchrist
Sem GPA 4.000			Cum GPA 3.927	14.00		14.00	56.00	
			Spring 2022					
PTE	100	D4	Property	4.00	B+	4.00	13.32	B. Lee
CLT	100	D4	Constitutional Law	4.00	A	4.00	16.00	J. Gora
CTL	100	D4	Contracts	4.00	A-	4.00	14.68	W. Taylor
LWR	101.4	D13	Gateway: Law & Social Justice	4.00	A	4.00	16.00	H. Gilchrist
Sem GPA 3.750			Cum GPA 3.844	16.00		16.00	60.00	
			Summer 2022					
CLN	206	D1	Judicial Externship Fieldwork	3.00	HP SK	3.00	0.00	J. Balsam
CLN	201.1	E2	Ext Sem - Learn Practice	1.00	A	1.00	4.00	M. Modafferi
Sem GPA 4.000			Cum GPA 3.848	4.00		4.00	4.00	

Fall 2022

IPL	235	E1	Information Privacy Seminar	2.00	A	2.00	8.00	A. Rausa
ICL	200	D1	Int'l Law	3.00	A+	3.00	12.99	E. Sthoeger
LWR	270	E4	Appellate Advocacy	2.00	A @	2.00	8.00	C. Trupp, A. Pathmanathan
LWR	320	D1	Brooklyn Law Review	2.00	P #	2.00	0.00	B. Jones-Woodin
LWR	400	D1	Moot Court Competitions	1.00	P	1.00	0.00	S. Caplow
CPL	200	D1	Evidence	4.00	B+	4.00	13.32	A. Hoag-Fordjour
Sem GPA 3.846 Cum GPA 3.848				14.00		14.00	42.31	

NEXT PAGE...

Credits Attempted: 67 Credits Completed: 67 Credits toward GPA: 59 GPA Grade Points: 228 GPA: 3.864
Comments: @ indicates successfully completed UCWR. # indicates successfully completed AWR. SK indicates successfully
completed Skills Requirement. Dean's List 2021 - 2022 END OF COMMENTS

Print Date: 06/11/23

Ms. Beatrice P. Rubin
170 Atlantic Ave.
Apt. 3
Brooklyn NY 11201

Student Name: Beatrice P Rubin
Student ID..: 0426513
Class: 2F

			Courses	Cred Att	Grd	Grad Crs	GPA Calc	Faculty

Spring 2023

RLP	200	D1	Administrative Law	3.00	A-	3.00	11.01	W. Araiza
BOL	400	D1	Intl Economic Law Colloquium	2.00	A	2.00	8.00	S. Dean, I. Ten Cate
LWR	320	D1	Brooklyn Law Review	1.00	P #	1.00	0.00	B. Jones-Woodin
LWR	400	D1	Moot Court Competitions	1.00	P	1.00	0.00	
CLN	214	D1	Clinic - BLIP	3.00	A SK	3.00	12.00	J. Askin

CLN	215	D1	Clinic - BLIP Seminar	2.00	A	SK	2.00	8.00	J. Askin
CLT	200	D1	First Amendment Law	3.00	A		3.00	12.00	J. Gora
Sem GPA 3.924 Cum GPA 3.864				15.00			15.00	51.01	

END OF THIS TRANSCRIPT

Credits Attempted: 67 Credits Completed: 67 Credits toward GPA: 59 GPA Grade Points: 228 GPA: 3.864
Comments: @ indicates successfully completed UCWR. # indicates successfully completed AWR. SK indicates successfully
completed Skills Requirement. Dean's List 2021 - 2022 END OF COMMENTS

June 15, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Dear Judge Underhill:

If I were a judge, I'd want Bea Rubin in chambers as my clerk. She is extraordinary in every respect that a judge would value. Speaking as someone with vivid memories of her own clerkship, I feel that I know—in part from not having been nearly as good at is as Bea—what the job entails.

Judges tell me they care foremost about strength in writing and research. Bea is a talented prose stylist--a good writer in the sense of knowing how sentences and paragraphs ought to look and sound and someone who earned high grades in Legal Writing--but that's only the beginning for her. You'll focus on clerkship applicants as producers of the writings that a judge counts on. Here Bea is extraordinary. As a writer, the able clerk understands what you seek with little hand-holding, knows on her own how to retrieve and synthesize materials that will support the document being formed (which might not be limited to draft versions of judicial opinions), asks you a clarifying question or two whenever she needs to but won't need to very often due to being smart and an excellent listener, shifts gears when necessary, and reliably presents what she gathers and creates with clarity, insight, style, and wisdom. That's Bea Rubin. Here's an overview of accomplishments Bea racked up to my great benefit in the two years since I met her in Zoom torts, the eight-week summer semester of 2021.

At the top of the list: scientific research I needed for the book I'm writing (for NYU Press) on law and policy related to male reproductive anatomical capacity. Science, medicine, and epidemiology that pertained to my work on this topic proved challenging for my students and me. Much of what I'd needed to find and read about semen in particular turned out not to use the word. I'm sure you've had the chance to observe the subtle barriers that screens and keyboards impose on research. Electronic technology yields an almost infinite harvest, but it's always dependent on algorithms that take word patterns for granted. Sometimes you can count on hits. (I write mostly about torts: in this field, "palsgraf" in a search rectangle will point the typist reliably to decisional law and secondary sources derived from a famous case.) Trying to educate myself and my research assistants about the law relating to sexual anatomy, I found myself more in a land of what "wills" or "consideration" or "family" produce online—elusive, that is, rather than generative of the discrete set of findings I sought. Other research assistants foundered on these shoals.

The challenge of what I needed to learn supports my conclusion that I have never employed a research assistant with greater strength at figuring out where to look and how to find it. All the more awe-inspiring when I recall that Bea isn't formally educated in science. Bea conquered the toughest challenges that my requests imposed. Prove a negative, check. Find what authors misdescribed or obfuscated in their own writing, check. Spot the anomaly amid consensus: yes. I was so impressed with Bea on this front that I asked her to explain where she thought her abilities originated, in hopes of becoming a better researcher myself.

Bea was characteristically modest in reply. Rather than advert to the intellectual heft that you can see demonstrated in her law school record or if you talk to her in an interview, Bea mentioned her experience in corporate communications and marketing--a line of work about which I know little and one I hadn't associated with the unpretentious seriousness that Bea brings to everything she does. As I understand what Bea said about her background, when supervisors at Civic Entertainment Group asked her to devise strategies and describe plans that multiple stakeholders would understand, Bea held herself to higher standards than any manager or colleague could reasonably expect. In one email message that I found especially insightful, Bea said that her built-in "curiosity and investigatory interests" made her "willing to continue to search and search" until she found "something relevant or helpful." Bea takes that approach to all of her work.

The research projects of mine at which she excelled included topics at a distance from sexual reproduction. I returned with Bea to an area I write in occasionally, legal malpractice, to learn what courts are doing with respect to expert testimony on legal ethics and professional responsibility. Bea found what I needed. Of possible interest to you as a writer, Bea also did excellent work in response to my request to find information about publishers and their expectations for the law-and-policy subset of nonfiction. Her outstanding research on post-Dobbs risks to pregnant women in need of medical care showcased another strength: the ability to connect judge-written law with consequences to human beings.

You probably have a transcript in this application file. I was pleased and slightly amused to see that Bea's A minus grade in the Torts class we shared is lower than her GPA. Bea's first graded course at Brooklyn illustrates how she operates: rather than feel discouraged for not having earned the highest possible score or content to cruise at the second-highest plane, Bea learned from her combination of success and disappointment and went on to earn an unbroken 4.0 when the fall semester of her first year started.

Bea's summer 2021 Zoom experience as I shared it with her was more than a grade, however. I remember with pleasure her contributions to class discussions in our videoconference format. When the fall semester started, Brooklyn moved to in-person classes and all of us, the students and I, got to meet each other with bodies attached to the postage-stamp headshots. Two of Bea's peers in that class happened to remark to me what a pleasure it was to meet Bea in real life and enjoy her collegial company. One of them was a young man who talked a lot into the camera and the other had participated more quietly. Nobody else in that class of 50 got singled out to me for unsolicited expression of appreciation from classmates.

Anita Bernstein - anita.bernstein@brooklaw.edu - 718-780-7934

In Bea you also have a stellar GPA, a great resume of experiences as a law student, writing samples that I think you'll like, and what I have to assume are strong letters from all recommenders. But those achievements are relatively easy to find. I am delighted to testify to Bea's rarer excellence as a writer, thinker, task-finisher, supporter, and colleague. I feel confident that no matter how strong the applicant pool is this year, Bea is a standout among prospective law clerks.

With all best wishes for your clerk-selection process.

Sincerely yours,

Anita Bernstein
Anita and Stuart Subotnick Professor of Law

Anita Bernstein - anita.bernstein@brooklaw.edu - 718-780-7934

June 12, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Dear Judge Underhill:

I am writing this letter of recommendation in support of the judicial clerkship application of Ms. Bea Rubin, a third-year student at Brooklyn Law School. I am very pleased to do so. She is one of our very best students, ranking in the top 5 percent of her class. I have had a very good opportunity to become familiar with her abilities, and I think she would make an outstanding law clerk. Ms. Rubin has taken two of my Constitutional Law courses and has excelled in both. Her stellar performance in those courses, her experiences both during and prior to law school, and her professionalism and maturity are all very strong factors in support of her impressive clerkship application.

During her first year, Ms. Rubin was in my large survey course in Constitutional Law and quickly came to my attention for her thoughtful and effective participation in class discussion. She demonstrated early on that she understood the often difficult issues in the course and could speak about them with authority. Her strong final examination paper came as no surprise at all. It was informed, analytically impressive and very well-written. She repeated that outstanding performance this past semester in a second-year course in First Amendment Law where she also got a grade of A because of her impressive and thoughtful class discussion and an outstanding final exam. I have had occasion to review her scholarly writing, and I found it well-researched, thoughtful and very well-written.

In addition, beyond her excellent course work, Ms. Rubin brings other important qualities to the table. She is on the Editorial Board of the Brooklyn Law Review and has had a wide variety of clinical and internship experiences, including one with United States District Judge Ann M. Connelly of the Eastern District of New York. She has also been serving as a Research Assistant to Professor Anita Bernstein, one of the most prolific scholars on our faculty. Especially interesting is that she spent several years between college and law school working in the music entertainment industry in a number of highly responsible positions. In that connection she was able to acquire a great deal of practical experience which I am confident will help enhance her abilities to assist the judicial work on cases in those and related business areas. Finally, Ms. Rubin is currently a Summer Associate at Cadwalader, Wickersham & Taft, one of the nation’s premier law firms, an experience which I am sure will enable her to bring additional helpful skills and tools to the discharge of clerkship responsibilities.

For all of these reasons, I am confident that Ms. Rubin has the potential to be a very effective and congenial member of your judicial team and has a promising future in the profession. I have spoken with her and am convinced of her strong interest in having the clerkship opportunity as an important building block to a successful and worthwhile legal career. She has the intelligence, maturity and commitment to discharge the duties of a law clerk in a very helpful way. I think she is an excellent clerkship candidate and most confidently endorse her application.

If I can provide any further information, please do not hesitate to contact me.

Sincerely,

Joel M. Gora
Professor of Law

Joel Gora - joel.gora@brooklaw.edu - 718-780-7926

June 12, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Dear Judge Underhill:

I am writing to offer my highest recommendation for Bea Rubin to serve as your law clerk.

I am the Founder/Director of the Brooklyn Law Incubator & Policy (BLIP) Clinic at Brooklyn Law School. The BLIP Clinic functions as a full-service law firm for bootstrapped, socially virtuous startups and entrepreneurs, typically trying to build products and services that the law has not anticipated.

I've had the pleasure to work closely with Bea over most of her 2L year and will continue to work with Bea through her 3L year. I have met very few students who demonstrated as much talent and professionalism as Bea. As part of the BLIP Clinic, Bea's role was to engage startups, entrepreneurs, and tech policy advocates and to encourage them to take advantage of the pro-bono services that BLIP offers. Bea has taken maximum advantage of the learning opportunities available to her.

To be successful at the BLIP Clinic, students need to be well versed across legal disciplines. Bea demonstrated a high level of facility across disciplines and had a fluidity and ease with speaking to clients about some of the most technical aspects of their innovations.

I chose Bea as one of just a couple of 2Ls to join the BLIP Clinic from among upwards of 120 applicants, almost all of whom I required to be in their last year of law school. I almost never select 2Ls for inclusion in BLIP, because they are generally not yet mature, seasoned, or broad enough in their legal knowledge and skills to tackle the issues that BLIP confronts. Bea had impressed me the moment I met her when she spoke eloquently and lucidly about multiple novel issues of law and policy. Thus, I made an exception to include Bea in BLIP because of her maturity and obvious skills and dedication. I look forward to witnessing her rise up as a leader among her peers into next year.

Bea has proven to be one of the most committed and inspired students I have ever had. She is also a pleasure with whom to work, for me, for our clients, and for her colleagues. She is a wonderful collaborator, who recognizes that teamwork and the sharing of credit is essential to top level work product. I had the chance to observe Bea at multiple events, and I was immediately impressed with the way that she could naturally make connections and engage. Bea has also demonstrated both outstanding leadership and collaboration skills. She is a strong team player and worked well under the direction of others.

I could always depend on Bea to be one of the first students to volunteer her knowledge, time, and skills. An active participant during clinic seminars and client meetings, she communicated professionally and respectfully with her supervisors, peers, and clinic clients. She is thoughtful, thorough, and has contributed creative solutions to the questions posed before her. She is able to consider the broader legal, political, and business contexts of the topic at issue, as well as identify the specific facts and issues that matter.

With an exceptionally strong work ethic, Bea has met all work submission deadlines and consistently submitted strong work product, even on short notice. She showed up early, stayed late, and was responsive outside of clinic hours. She has a demonstrated ability to absorb new information and develop her skills quickly. Bea responded positively to critical feedback from both supervising attorneys and her peers.

Bea learns quickly and welcomes constructive criticism. She takes pride in her work and executes assignments diligently. She is a terrific law student both in her doctrinal and experiential classes.

Bea's research and writing skills and the quality of her advocacy and presentation style are impeccable. Her research has been thorough, her efforts have been tireless, and her leadership has been most admirable.

Bea is never afraid to take on the toughest issues, novel issues, or concepts outside her core competencies. She is a particularly quick study and a terrific, precise, and thoughtful researcher and writer.

Bea has always impressed me with her positive attitude and participation in BLIP. She is second to none when it comes to managing our clients and juggling competing deadlines. She has proven herself to be a terrific team player, very professional, with great attention to detail.

Jonathan Askin - jonathan.askin@brooklaw.edu

Again, I would like to offer my highest recommendation. I have no doubt that Bea will be a terrific asset to your office and a joy to have within your orbit. I also have no doubt she will rise to be smart, ethical, and forward-looking asset to the profession and society.

Respectfully,

Jonathan Askin
Founder/ Director
Brooklyn Law Incubator & Policy Clinic

BEA RUBIN
170 Atlantic Avenue, Apartment 3, Brooklyn, NY 11201
(610) 585-5563 | beatrice.rubin@brooklaw.edu

WRITING SAMPLE

The below writing sample is from a brief written for my 2022 fall semester Appellate Advocacy class for which I earned an A. The case involved an individual convicted of twenty-two counts of criminal possession of a forged instrument in the second degree who was appealing his conviction because the lower court's finding that the police had probable cause to search his vehicle based solely on the smell of marijuana was no longer permissible under the Marihuana Regulation and Taxation Act ("MRTA").

I represented the appellant, Bernard Fabien, in support of reversing the lower court's decision. I have included the argument section of the brief as my writing sample.

ARGUMENT

I. MR. FABIEN'S CONVICTION SHOULD BE OVERTURNED BECAUSE THE POLICE LACKED PROBABLE CAUSE TO SEARCH MR. FABIEN'S VEHICLE BASED SOLELY ON THE SMELL OF MARIJUANA.

Bernard Fabien's conviction should be reversed because the Court's finding that police had probable cause to search Mr. Fabien's vehicle based solely on the fact that police smelled marijuana is no longer permissible under the Marihuana Regulation and Taxation Act ("MRTA"). *See infra* Section I.A. The MRTA notes that the odor of marijuana cannot be the sole basis for a "determination of reasonable cause to believe a crime has been committed." N.Y. PENAL LAW § 222.05(3) (McKinney 2022). The MRTA should apply to Mr. Fabien's case on appeal because, under common-law and the MRTA, an appeal should be decided based on existing laws at the time of the appeal. *See infra* Section I.B; *People v. Vasquez*, 670 N.E.2d 1328, 1333 (N.Y. 1996). In the alternative, because the MRTA reduces punishments for marijuana-related crimes, it is ameliorative in nature and should apply retroactively to Mr. Fabien's vehicle search. *See infra* Section I.C; *Duell v. Condon*, 84 N.Y.2d 773, 783 (N.Y. 1995).

A. Under the MRTA, there was no probable cause for the search of Mr. Fabien's vehicle based solely on the smell of marijuana.

The evidence seized during the search of Mr. Fabien's vehicle after a routine traffic stop should have been suppressed because the police did not have probable cause to search his vehicle based solely on the odor of marijuana under the Marihuana Regulation and Taxation Act ("MRTA"). The MRTA was enacted in March 2021 as a measure designed to benefit the welfare of the general public by replacing existing laws that had not effectively reduced marijuana use and had rather led to racially disparate impacts, such as mass incarceration, which largely affected African-American and Latinx communities. S. 854-A, Art. 1 § 2, 2021–2022 Reg. Sess.

(Ny. 2021). To prevent these high rates of criminalization of minor marijuana-related charges, the statutory text is explicit in emphasizing that the smell of marijuana cannot be the sole basis supporting a "finding or determination of reasonable cause to believe a crime has been committed." N.Y. PENAL LAW § 222.05(3)(a-b) (McKinney 2022). Therefore, as it relates to a vehicle search, police do not have probable cause to search a vehicle based solely on the smell of marijuana under the MRTA.

In Mr. Fabien's case, the sole reason that the police searched his vehicle was because they smelled marijuana as they approached the vehicle. If the MRTA had existed at the time of Mr. Fabien's vehicle search, the police would not have had probable cause to search Mr. Fabien's vehicle based solely on the smell of marijuana. Therefore, the evidence seized pursuant to that search should be suppressed and Mr. Fabien's conviction reversed.

B. The MRTA should apply to Mr. Fabien's appeal because, under the terms of the MRTA and traditional common-law principles, an appeal should be decided based on existing laws at the time of the appeal.

Additionally, the MRTA applies to Mr. Fabien's appeal as a criminal proceeding since an appeal should be decided based on the existing laws at the time of the appeal.

The statutory language of the MRTA notes that it covers "any criminal proceeding," including motions to suppress evidence. N.Y. PENAL LAW § 222.05(3) (McKinney 2022); *see also* N.Y. CRIM. PROC. LAW § 710.20 (McKinney 2017). New York Criminal Procedure Law broadly defines a "criminal proceeding" as "any proceeding which (a) constitutes a part of a criminal action," beginning with the filing of an accusatory instrument and ending with the imposition of a sentence or a final disposition, or "(b) occurs in a criminal court and is related to a prospective, pending, or completed criminal action . . . or involves a criminal investigation." N.Y. CRIM. PROC. LAW §§ 1.20(16), (18) (McKinney 2022). Therefore, because Mr. Fabien's

appeal is part of his criminal action and related to a prospective, pending, or completed criminal action, it constitutes a criminal proceeding under the MRTA.

Moreover, "[u]nder traditional common-law principles, cases on direct appeal are generally decided in accordance with the law as it exists at the time the appellate decision is made." *People v. Vasquez*, 670 N.E.2d 1328, 1333 (N.Y. 1996). For example, in *People v. Pena*, this Court applied an amended New York Criminal Procedure Law at the time of the appeal, rather than at the time of the trial, to determine that the trial court's decision to release a deliberating jury for the weekend over the defendant's objection was permissible. *People v. Pena*, 766 N.Y.S.2d 196, 196 (N.Y. App. Div. 1st Dep't 2003).

Like the defendant's appeal in *Pena*, Mr. Fabien's appeal should be based on the law as it currently stands. Because the MRTA is currently the law in New York, it should apply to his appeal. Therefore, the evidence seized pursuant to the search of Mr. Fabien's vehicle should be suppressed under the MRTA, and Mr. Fabien's conviction should be reversed.

C. Alternatively, the MRTA should apply retroactively to Mr. Fabien's appeal because the MRTA is an ameliorative statute.

As an alternative, the MRTA should apply to Mr. Fabien's appeal retroactively because it is an ameliorative statute. *Duell v. Condon*, 84 N.Y.2d 773, 783 (N.Y. 1995).

Although this Court and the other NY Departments have recently held that the MRTA should not apply retroactively to violent crimes relating to marijuana possession, respectfully, this Court should rethink the retroactive application of the MRTA as it relates to Mr. Fabien's case. The Court of Appeals has not yet ruled on questions of retroactivity as it relates to the MRTA, and *People v. Pastrana*, in which this Court held that the MRTA should not apply retroactively, was recently granted leave to the Court of Appeals. *People v. Pastrana*, 205 A.D.3d 461, 463 (N.Y. App. Div. 1st Dep't 2022), *leave to appeal granted*, 193 N.E.3d 529

(N.Y. 2022). Mr. Fabien's marijuana possession, while not charged, would not be a crime today under the MRTA, and therefore his vehicle search should be suppressed based on retroactive application of the MRTA.

While "[t]he general rule is that nonprocedural statutes are not to be applied retroactively absent a plainly manifested legislative intent to that effect," ameliorative statutes, which reduce the punishment for a particular crime, apply retrospectively. *People v. Behlog*, 74 N.Y.2d 237, 240 (N.Y. 1989) (quoting *People v. Oliver*, 1 N.Y.2d 152, 157 (N.Y. 1956)). In fact, "the law is settled that the lesser penalty may be meted out in all cases decided after the effective date of the enactment, even though the underlying act may have been committed before that date." *Oliver*, 1 N.Y.2d at 160. The Court of Appeals explains this exception to retroactivity because, in mitigating the punishment, the "[l]egislature is necessarily presumed to have determined the lesser penalty sufficiently serves the legitimate demands of the criminal law." *Behlog*, 74 N.Y.2d at 240 (citing *Oliver*, 1 N.Y.2d at 160). Therefore, the Court of Appeals has emphasized that after the remedial statute goes into effect, "the excess in punishment can . . . serve no purpose other than to satisfy a desire for vengeance." *Oliver*, 1 N.Y.2d at 160.

To determine if the statute is ameliorative and intended to apply retroactively, the Court of Appeals examines the statutory language and legislative intent. *Duell*, 84 N.Y.2d at 783. "When interpreting a statute, the words used by the [l]egislature are to be given their usual and commonly understood meaning unless the statute plainly indicates that a different meaning was intended." *Id.* at 780. However, where there are "no express instructions in the statute as to its effect on prior behavior," the Court of Appeals has held that it requires determining the legislative intent based on the nature of the legislation, its "general object," and any evidence from accompanying memorandum offered by the legislature. *Id.* at 783; *Oliver*, 1 N.Y.2d at 160.

For example, in *Duell*, the Court of Appeals interpreted the language of a rent control law based on its purpose of leveling the playing field between landlords and tenants to determine that it was meant to apply retroactively. *Duell*, 84 N.Y.2d at 780. Similarly, in *Oliver*, the Court of Appeals held that the "general object" of a statute indicated that it should apply retroactively, based on the legislative memorandum approving the bill and because the legislature did not clearly indicate the statute's effect on previous behavior. *Oliver*, 1 N.Y.2d at 160–62. Moreover, the Court justified this determination based on the legislative history as to the purpose of the amendment whose goals included rectifying injustices of punishing small street crimes with a severity equivalent to white collar theft involving large sums of money. *Id*.

Like the statutes in *Duell*, *Oliver* and *Behlog*, the MRTA was designed as a remedial statute. In fact, the legislature expressly noted that the MRTA's goal was to "amend" the penal law and criminal procedure law as it related to marijuana and "reduce the illegal drug market and reduce violent crime," which existing laws were "ineffective in reducing" and "instead resulted in devastating collateral consequences" and "racially disparate impact[s]." S. 854-A, Art. 1 § 2, 2021–2022 Reg. Sess. (Ny. 2021). The MRTA was created to regulate the marijuana market and reduce unjust criminalization that disproportionately impacted communities of color. *See* N.Y. PENAL LAW § 222.25 (McKinney 2022); S. 854-A, Art. 1 § 2, 2021–2022 Reg. Sess. (Ny. 2021); N.Y. STATE OFF. CANNABIS MGMT., ASSESSMENT OF THE POTENTIAL IMPACT OF REGULATED MARIJUANA IN NEW YORK STATE, S. DOC. at 27 (July 2018). Like the criminal statute in *Behlog*, the MRTA declassifies certain criminal conduct, like the simple possession of marijuana that Mr. Fabien was suspected of here, and reduces the penalties imposed. Therefore, based on its legislative history, the MRTA is an ameliorative statute designed to mitigate the punishment for marijuana-related crimes.

In turn, like the statutes in *Duell*, *Oliver* and *Behlog*, because the MRTA is ameliorative, it should be applied retroactively to Mr. Fabien's crime. While the MRTA does not expressly indicate whether it should apply retroactively to vehicle searches based on the smell of marijuana, it nevertheless implies retroactive intent. For example, the MRTA "automatically vacate[d], dismiss[ed] and expunge[d]" previously-criminalized offenses for marijuana possession that were either reduced or eliminated by the MRTA. S. 854-A, § 222.65 (§24), 2021–2022 Reg. Sess. (Ny. 2021); *see also* N.Y. CRIM. PROC. LAW § 440.46(a)(1) (McKinney 2021). Additionally, as in *Oliver*, the MRTA's retroactive application is also evident by its legislative history and the legislature's goal to rectify injustices of punishing minor marijuana possession in ways that disproportionately affected African-American and Latinx communities. S. 854-A, Art. 1 § 2, 2021–2022 Reg. Sess. (Ny. 2021); *see also* N.Y. STATE OFF. CANNABIS MGMT., ASSESSMENT OF THE POTENTIAL IMPACT OF REGULATED MARIJUANA IN NEW YORK STATE, S. DOC. at 27 (July 2018). Therefore, although Mr. Fabien, an African-American man, was not charged with marijuana possession, the evidence seized pursuant to the vehicle search based solely on the odor of marijuana that ultimately led to his arrest should be suppressed with this same intention in mind.

Nevertheless, even if this Court perceives the MRTA as unsettled regarding retroactive application, pursuant to the rule of lenity, the ambiguity in the MRTA should be construed in Mr. Fabien's favor. *People v. Badji*, 165 N.E.3d 1068, 1075–76 (N.Y. 2021). "Lenity is warranted where the courts have the task of discerning the undeclared will of the legislature in an ambiguous statute." *Id.* at 136. Therefore, if this Court believes that the legislative intent is unclear regarding the retrospective application of the MRTA, it should still favor applying the MRTA to Mr. Fabien's appeal.

This issue does not require preservation because the MRTA was enacted in March 2021, and "[n]ew questions of law, which could not have been raised below, may be presented for the first time on appeal." *Matter of OnBank & Tr. Co.*, 688 N.E.2d 245, 247 n.2 (N.Y. 1997). Therefore, the application of the MRTA to the search of Mr. Fabien's vehicle and the evidence seized pursuant to that search can be raised on appeal.

As the Court of Appeals noted in *People v. Crimmins*, "every error of law . . . is . . . deemed to be prejudicial and to require a reversal, unless that error can be found to have been rendered harmless by the weight and the nature of the other proof." *People v. Crimmins*, 326 N.E.2d 787, 794 (N.Y. 1975). Moreover, "an error is prejudicial in this context if the appellate court concludes that there is a significant probability . . . that the jury would have acquitted the defendant had it not been for the error or errors which occurred." *Id.* In Mr. Fabien's case, the error cannot be deemed harmless because the credit cards were the basis for Mr. Fabien's conviction. Without the credit cards, there would not have been a trial and certainly not a conviction, and therefore their erroneous admittance was certainly not harmless.

In conclusion, the evidence seized pursuant to the search of Mr. Fabien's vehicle should be suppressed under the MRTA because there was no probable cause to search his vehicle based on the odor of marijuana under the MRTA. Because Mr. Fabien's conviction hinged on the credit cards seized from the illegal search of his vehicle, his conviction should be reversed, and his indictment dismissed.

CONCLUSION

FOR THE REASONS HEREIN, THE CREDIT CARDS SEIZED PURSUANT TO THE ILLEGAL SEARCH OF MR. FABIEN'S VEHICLE SHOULD BE SUPPRESSED, MR. FABIEN'S CONVICTION SHOULD BE REVERSED, AND HIS INDICTMENT DISMISSED IN THE INTEREST OF JUSTICE.

Applicant Details

First Name	**Shane**
Last Name	**Russell**
Citizenship Status	**U. S. Citizen**
Email Address	**shane.russell@uconn.edu**
Address	**Address** Street **107 Harvest Lane** City **Milford** State/Territory **Connecticut** Zip **06461** Country **United States**
Contact Phone Number	**2038874365**

Applicant Education

BA/BS From	**University of New Haven**
Date of BA/BS	**May 2019**
JD/LLB From	**University of Connecticut School of Law** **https://www.law.uconn.edu/**
Date of JD/LLB	**May 15, 2022**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**Connecticut Journal of International Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

de Figueiredo, Miguel
miguel.defigueiredo@uconn.edu
8605705322
Humber, Nadiyah
nadiyah.humber@uconn.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

SHANE RUSSELL
107 Harvest Lane
Milford, CT 06461
(203) 887-4365
Shane.Russell@uconn.edu

May 1, 2023

United States Courthouse
915 Lafayette Boulevard – Suite 411
Bridgeport, Connecticut 06604

Dear Honorable Judge Underhill:

I graduated from the University of Connecticut School of Law in May of 2022, and am applying for a 2024-2026 clerkship in your chambers. Until then, I will be working as an honors attorney with the Department of Homeland Security in Washington, D.C.

I am applying to your chambers, in part, because I wish to move back to Connecticut with the ultimate goal of becoming an AUSA. As a judicial intern during law school, I developed a passion for scouring case law, evaluating arguments, interrogating the record, and preparing draft rulings. My brief time practicing has only increased these interests—while allowing me time to perfect my Boolean search strings.

I have embraced adversity and diversity throughout my personal, academic, and professional life. Despite coming from a family well below the federal poverty level, I became a first-generation *college* graduate. While subsequently serving my community as a police officer, I attended law school full-time to further my career in public service. I continue to learn many valuable lessons along my journey and hope to have the opportunity to bring them to your chambers.

Enclosed, please find my resume, transcript, writing sample, and letters of recommendation from Professor Miguel de Figueiredo and Professor Nadiyah Humber.

Thank you for your consideration!

Respectfully,

Shane Russell

Shane Russell

Shane.Russell@UConn.edu ◆ (203) 887-4365 ◆ 107 Harvest Lane, Milford, CT, 06461

EDUCATION

University of Connecticut School of Law, Hartford, CT — Full-Time

Juris Doctor, *honors*, May 2022
GPA: 3.665 (Top 30%)
Honors/Awards: University of Connecticut Scholar (merit-based, full-tuition scholarship)
Activities: Connecticut Journal of International Law

University of New Haven, West Haven, CT

Bachelor of Arts in Criminal Justice, *magna cum laude*, May 2019
GPA: 3.73

Connecticut State Police Officer Training Academy, Meriden, CT

Connecticut Police Officer Certification, March 2015
Top 10% of class

EXPERIENCE

Department of Homeland Security – Washington, D.C. — Oct. 2022 - Oct. 2024

Honors Attorney, Office of General Counsel

Two-year honors attorney position where I will rotate through headquarters and component offices. I am currently in the Operations and Enforcement Law Division where I conduct research and draft memoranda addressing various cross-cutting issues including:

- The scope of ICE's organic narcotics enforcement authority
- Litigation risks to proposed International Emergency Powers Act regulations
- Federal law enforcement's authority to assist state and local agencies
- Fourth Amendment concerns regarding DHS' use of drones
- The legal status of interdicted migrants while at Guantanamo Bay
- Potential prohibitions pursuant to EO 13873 – Securing the Information and Communications Technology and Services Supply Chain

Local Connecticut Police Departments – Trumbull and West Haven, CT — Sept. 2014 – October 2022

Police Officer

United States District Court, District of Connecticut – Bridgeport, CT — Jan. 2022 - May 2022

Judicial Intern, for Hon. Magistrate Judge S. Dave Vatti

University of Connecticut Center on Community Safety, Policing, and Inequality — Sept. 2021 - May 2022

Student Fellow

Assisted in the Center's inaugural year with research and outreach to local and state-wide institutions in the service of criminal justice reform. Analyzing how Federal Rule of Evidence 609 potentially disadvantages communities with an outsized amount of police interaction by silencing trial input from marginalized communities.

Kings County Supreme Court – Brooklyn, New York — June 2021 - August 2021 (2L summer)

Judicial Intern, for Hon. Judge Dineen Riviezzo

United States Attorney's Office, District of Connecticut – New Haven, CT — June 2020 - August 2020 (1L summer)

Legal Intern

INTERESTS

Proud father to the loveliest six-month-old baby boy and 10-pound Morkie. Enjoy all things news, sports, and tech. Avid Minnesota Vikings fan.

University of Connecticut

Unofficial Transcript

Name: Shane Russell
Student ID: 1846351

Print Date: 08/17/2022

Degrees Awarded

Degree: Juris Doctor
Confer Date: May 15, 2022
Degree Honors: Honors
Plan: Law - JD Day Division

Beginning of Law Record

Fall 2019 (2019-08-26 - 2019-12-20)
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7500	Civil Procedure	4.00	4.00	B+	13.200
LAW	7505	Contracts	4.00	4.00	A-	14.800
LAW	7510	Criminal Law	3.00	3.00	B	9.000
LAW	7518	Lgl Practice: Rsrch & Writing	2.00	2.00	B+	6.600
LAW	7530	Torts	3.00	3.00	B	9.000

			Attempted	Earned	GPA Units	Points
Semester GPA	3.288	Semester Totals	16.00	16.00	16.00	52.600
Cumulative GPA	3.288	Cumulative Totals	16.00	16.00	16.00	52.600

Spring2020 (2020-01-21 - 2020-05-15)
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7519	Lgl Practice: Negotiation	3.00	3.00	P	0.000
LAW	7520	Lgl Practice: Intrv,Cnsl & Adv	3.00	3.00	P	0.000
LAW	7525	Property	4.00	4.00	P	0.000
LAW	7540	Constitutional Law, An Intro	4.00	4.00	P	0.000
LAW	7878	International Human Rights	3.00	3.00	B+	9.900

Class rank: 3rd Quintile (3.370-3.203)

The COVID-19 pandemic resulted in changes to course delivery modality and academic policies. No inferences should be made regarding PASS grades during this exceptional time.

			Attempted	Earned	GPA Units	Points
Semester GPA	3.300	Semester Totals	17.00	17.00	3.00	9.900
Cumulative GPA	3.289	Cumulative Totals	33.00	33.00	19.00	62.500

Summer2020
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7499	Rank/Quintile Statistics	0.00	0.00		0.000

Class rank: 3rd Quintile (3.363-3.196)

			Attempted	Earned	GPA Units	Points
Semester GPA	0.000	Semester Totals	0.00	0.00	0.00	0.000
Cumulative GPA	3.289	Cumulative Totals	33.00	33.00	19.00	62.500

Fall 2020 (2020-08-31 - 2020-12-22)
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7356	Energy Law and the Courts	3.00	3.00	A	12.000
LAW	7565	Legal Profession	3.00	3.00	B+	9.900
LAW	7605	Business Organizations	3.00	3.00	P	0.000
LAW	7645	Criminal Procedure	3.00	3.00	A	12.000
LAW	7725	Mergers/Acquisitions	2.00	2.00	P	0.000

			Attempted	Earned	GPA Units	Points
Semester GPA	3.767	Semester Totals	14.00	14.00	9.00	33.900
Cumulative GPA	3.443	Cumulative Totals	47.00	47.00	28.00	96.400

Spring2021
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7560	Evidence	3.00	3.00	P	0.000
LAW	7655	Employment Discrimination Law	3.00	3.00	A-	11.100
LAW	7742	Trusts & Estates	3.00	3.00	P	0.000
LAW	7926	Sports and the Law	3.00	3.00	A	12.000

Class rank: 2nd Quintile (3.655-3.515)

			Attempted	Earned	GPA Units	Points
Semester GPA	3.850	Semester Totals	12.00	12.00	6.00	23.100
Cumulative GPA	3.515	Cumulative Totals	59.00	59.00	34.00	119.500

Fall 2021 (2021-08-30 - 2021-12-21)
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7636	Corporate Finance	3.00	3.00	P	0.000
LAW	7777	Race & American Legal Systems	2.00	2.00	A	8.000
LAW	7792	Street Law in the High Schools	3.00	3.00	A	12.000
LAW	7796	Field Placement: State Att-Sem	2.00	2.00	A	8.000
LAW	7797	Field Placement: State Att-Fld	2.00	2.00	P	0.000
LAW	7806	Renewable Energy Law	3.00	3.00	A	12.000

			Attempted	Earned	GPA Units	Points
Semester GPA	4.000	Semester Totals	15.00	15.00	10.00	40.000
Cumulative GPA	3.625	Cumulative Totals	74.00	74.00	44.00	159.500

University of Connecticut

Unofficial Transcript

Name: **Shane Russell**
Student ID: **1846351**

Spring2022 (**2022-01-18** - **2022-05-12**)
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course	Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW 7366	White Collar Crime	3.00	3.00	A-	11.100
LAW 7759	The Nuremberg Trials	2.00	2.00	A	8.000
LAW 7912	Law, Consciousness & Free Will	3.00	3.00	A	12.000
LAW 7996	Field Placement: Individual	3.00	3.00	P	0.000
Note:	*Site: United States District Court, District of Connecticut, Chambers of Judge S. Dave Vatti*				
LAW 7998	Legal Editorship	1.00	1.00	P	0.000

			Attempted	Earned	GPA Units	Points
Semester GPA	3.888	Semester Totals	12.00	12.00	8.00	31.100
Cumulative GPA	3.665	Cumulative Totals	86.00	86.00	52.00	190.600

Summer2022

Course	Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW 7499	Rank/Quintile Statistics	0.00	0.00		0.000

Class rank: 2nd Quintile (3.722-3.603)

			Attempted	Earned	GPA Units	Points
Semester GPA	0.000	Semester Totals	0.00	0.00	0.00	0.000
Cumulative GPA	3.665	Cumulative Totals	86.00	86.00	52.00	190.600

Law Career Totals

Cumulative GPA	3.665	Cumulative Totals	86.00	86.00	52.00	190.600

End of Unofficial Transcript

May 01, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Dear Judge Underhill:

Re: Letter of Recommendation for Shane Russell

It is with great pleasure that I write to give Shane Russell my recommendation to serve as a law clerk for your chambers. Shane's law enforcement experience, analytic ability, and strong work ethic make him a strong clerkship candidate. I met Shane in the fall of 2020, when he enrolled in my criminal procedure course. In this context and more recently by reading a paper of his, I came to know Shane's analytical and writing skills well. I also had the opportunity to interact with him in person on a number of occasions.

From the beginning, Shane was an incredibly engaged learner – the kind of student who had an intrinsic interest in the material, and who struck the right balance between confidence and humility. As a police officer, he brought a wealth of on-the-ground experience that I thought was incredibly valuable in the classroom (and would be similarly beneficial in judicial chambers and the courtroom). Although the connection is obvious between his work as a police officer and an investigatory criminal procedure course are substantively self-apparent, he also brought a sense of empathy and maturity to the Law School that won over faculty and his fellow students. As evidence, Shane was chosen among an incredibly large and strong pool of candidates to be in the inaugural class of student fellows at the University of Connecticut School of Law's Center on Community Safety, Policing, and Inequality, which is one of the most important strategic initiatives of Eboni Nelson, our Dean.

At a time when law students feel under pressure to receive good grades because of the difficulties of a challenging job market, Shane never compromised his principles of helping others. I saw him helping his fellow students, and perhaps more striking was that he emerged as one of the students in the class that others viewed as having a good grasp of the material. That said, Shane's performance in the class speaks for itself – he received an A in a class with a strict curve, where only seven A's were given in a class of 60. These are classes that are extremely demanding, and where just about all of the students are very diligent. Moreover, the comments he made in class were always thoughtful, and he was able to bring a good combination of lived experience and rigorous analytic reasoning in his engagement with the material – a quality that would be of benefit for any judge to have. In addition to his participation in class, one clear example of this type of analysis is in a research paper he wrote on his own over the summer. Shane pursued this line of interest not for a class, journal, or independent study, but purely as a labor of love, underscoring his strong intrinsic motivation for doing legal analysis. The skillfully written paper not only shows good command of the doctrine governing pretextual stops, but Shane demonstrates the variation in statutory construction and enforcement in a variety of jurisdictions, while highlighting the difficult tradeoffs involved in decisions that would narrow the rulings in Whren and Schneckloth. During a time where the discourse has become incredibly polarized on such issues, Shane offers a refreshingly nuanced take that not only draws on doctrinal analysis, but also on the empirical realities of on-the-ground enforcement.

Finally, I would like compelled to mention some aspects about Shane's background that he is very unlikely to mention himself. Shane faced immense challenges growing up in his family. He is one of seven children that grew up in a two-bedroom house with both parents that had substance abuse issues. He is a first-generation college student that relied on free breakfast and lunch from local public schools and worked either part time or full time since he was 18 years old. This was something I learned from Shane very recently, only after asking him specifically about his background. I think this adversity likely sowed the seeds for his long-standing commitment to public service, which in addition to his work as a police officer also includes experience internship and clinic experience with the Connecticut State's Attorney, the U.S. Attorney's Office, and a Kings County Supreme Court judge in Brooklyn, New York.

Given these aspects of Shane's experience, I urge you to consider taking him as a clerk in your chambers. Please do not hesitate to get in touch with me should you have any questions or concerns about Shane's candidacy.

Sincerely,

Miguel de Figueiredo
Associate Professor and Terry J. Tondro Research Scholar
University of Connecticut School of Law

Miguel de Figueiredo - miguel.defigueiredo@uconn.edu - 8605705322

May 01, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Dear Judge Underhill:

I write to enthusiastically recommend Mr. Shane Russell to be a clerk in your chambers. I was thrilled when Shane asked me to write him a letter of recommendation because, as referenced in his application materials, he is a committed public servant and works as a police officer in Trumbull, Connecticut. Shane's occupation is worth noting because he was a student in my Race and the American Legal System course last fall. Considering his vocation and the subject matter of the course, his enrollment in my class signals that he is open-minded and appropriately curious.

Shane performed very well in my class. My seminar consists of weekly written assignments, oral presentations, and a term paper. Despite his demanding work schedule, Shane was always on-time for class and when submitting assignments. Shane stood out to me in class because of his contributions to difficult topics. My class raises questions about contentious relations that exist between police and people of color. Shane is on the front line of issues related to race relations and police, and he still maintained open discourse and demonstrated a keen ability to voice his perspective with candor and thoughtfulness. He analyzed issues deeply and was not reserved to one point of view.

For example, in one class we were discussing race and business law. One of the assigned articles was about the SEC's approval of the Nasdaq diversity rule. Shane has an instinct for thinking about business-related questions and effects on communities of color. While most students commended the rule and highlighted its contribution of inclusion on corporate boards, Shane identified the rule's shortcomings by explaining how the discretionary nature of the rule, due to the "explain why" provision, had no power of enforcement and would ultimately be futile. Shane thinks independently and does not get caught up in what he thinks he should say. Rather, Shane is a very judicious, critical thinker.

Shane's intelligence is apparent in his writing ability. In my seminar, students are required to engage in weekly reflective writing assignments. For most reflection papers students are required to respond to question prompts. All papers were graded based on the quality of writing and depth of reflection. Shane's reflection papers were impressive. He took it upon himself to go further than simply writing responses to questions. He often conducted additional research to inform his responses, which resulted in more comprehensive and sophisticated assessments.

Shane has an inquisitive mind and shared with me his affinity for conducting research. For example, one of our class topics concerned systemic racism in public education. We discussed several seminal education law cases like *Milliken v. Bradley*, et al., and explored funding issues concerning public schools and charter programs in Connecticut. Shane researched statistics for how much the state spends per student in certain municipalities using a government database. Shane is excellent at navigating resources and synthesizing data. His research was thorough and specific.

Shane's final paper was excellent. Not only did he submit a well-written, organized piece of writing, but the process of completion was smooth. Students were required to submit a first draft for written feedback. Shane's submission was anything but half-hearted. It was a nearly complete paper with an ordered structure. I was impressed by Shane's attention to detail and how he incorporated my feedback. The final paper was fluid, well-researched, and interesting. Writing is one of Shane's many strengths.

I want to highlight another reason why Shane's contributions to classroom discussion were so valuable. His comments were informed by his diverse background and his high level of maturity. I am confident the significance of his life-experience will translate into his clerkship. For example, Shane is a first-generation college student and has worked incredibly hard to make it to law school. He grew up in poverty as one of seven children in a two-bedroom home. His father was a machinist and his mother a homemaker. Shane is no stranger to the realities of substance abuse issues because it afflicted members of his family. Shane grew up living with people of all races and religions and talked about his past relationships in class when we discussed race in our education system.

Shane walks through this world with empathy for others and understands lived experiences of others. His background is a rare asset in the legal profession and will only contribute to his success. Shane will be an excellent law clerk and an outstanding lawyer. I strongly urge you to consider him for a clerkship. If I can provide you with any more information or insight for his candidacy, please do not hesitate to contact me.

Sincerely,

/s/ *Nadiyah J. Humber*

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WRITING SAMPLE

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As an honors attorney with the Department of Homeland Security's Operation and Enforcement Law Division, I drafted the attached memorandum which explores how the Fourth Amendment may restrict certain warrantless drone surveillance practices.

This memorandum is entirely my own and has not been edited by any other person. My supervisors authorized me to use the memorandum as a writing sample.

PURPOSE

Law enforcement agencies, including those in DHS components, increasingly deploy unmanned aerial vehicles—*i.e.*, "drones"—to conduct surveillance cheaper, more effectively, and at a far greater scale than traditional techniques.[1] Despite their increased use, the Supreme Court and the entire Federal Circuit Court of Appeals have yet to hear a case directly considering the Fourth Amendment implications of warrantless drone surveillance.[2] Nevertheless, existing doctrines governing general aerial and technological surveillance provide a framework to inform drone surveillance operations.

This memorandum prospectively identifies and analyzes several practical guardrails to minimize litigation risks for warrantless drone surveillance. The first section discusses the two parallel tracks governing Fourth Amendment searches. The second section analyzes how Supreme Court cases sanctioning traditional aerial surveillance transfer to drone practices. The third section analyzes how Supreme Court's "whole-of-movement" privacy doctrine announced in *Carpenter* may limit extensive, long-term drone surveillance operations.[3] The final section discusses the potential for courts to apply the common-law trespass doctrine to protect property owners from low-altitude drone flights.[4]

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[1] *See* Conor Friedersdorf, *Eyes over Compton: How Police Spied on a Whole City*, ATLANTIC (Apr. 21, 2014), https://www.theatlantic.com/national/archive/2014/04/sheriffs-deputy-compares-drone-surveillance-of-compton-to-big-brother/360954/. (discussing how an entire drone system "costs less than the price of a single police helicopter and costs less for an hour to operate than a police helicopter … [but] it watches 10,000 times the area that a police helicopter could watch.").

[2] A Westlaw search of*:* ["drone" OR "unmanned aircraft system" & "4th Amendment" OR "Fourth Amendment"] filtered by Federal Court of Appeals yielded no relevant results (Mar. 31, 2023). Similarly, a Westlaw search of ["drone" AND "warrantless"] yielded no federal Cases, Trial Court Orders, or Trial Court Documents suppressing, or reversing the admission of, drone surveillance evidence

[3] *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018) (holding that individuals have a "reasonable expectation of privacy in the whole of [their] physical movements.")

[4] This memorandum does not discuss the "technology-enhanced surveillance" doctrine that the Supreme Court introduced and applied to thermal imaging devices in *Kyllo*. The Supreme Court held in *Kyllo* that the government violates an individual's reasonable expectation of privacy when it uses advanced technologies that are "not in general public use to

DISCUSSION

I. The Two Fourth Amendment Tests: *Jones* and *Katz*

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[5] Accordingly, government officials generally must obtain a warrant or qualify for a warrant exception before conducting a "search."[6] The Supreme Court has promulgated two frameworks governing Fourth Amendment searches: a common law trespass-based theory and a modern personal privacy-rights theory.

A. *Jones'* Trespass Test

The Supreme Court has long recognized the common-law principle prohibiting the government from trespassing onto private property to collect criminal information.[7] Recently, the Supreme Court reaffirmed this doctrine continues to protect against physical intrusions into "houses, papers, and effects."[8] In *Jones*, the Supreme Court held the government's installation of a GPS device

explore details of a private home that would previously have been unknowable without physical intrusion." However, this doctrine's applicability to drone technology is limited because drones are likely in "general public use" – a term that the Supreme Court has never defined or clarified.

[5] U.S. Const. amend. IV.

[6] *See Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."); *Weeks v. United States*, 232 U.S. 383, 393 (1914).

[7] *See, e.g., Silverman v. United States*, 365 U.S. 505, 506 (1961) (finding a 4th Amendment violation "based upon the reality of an actual intrusion into a constitutionally protected area"); *Olmstead v. United States*, 277 U.S. 438, 466 (1928), *overruled by Katz v. United States*, 389 U.S. 347 (1967) (holding that no 4th Amendment violation can be found "unless there has been . . . an actual physical invasion of [the] house.").

[8] *Jones*, 565 U.S., at 405 ("The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous.").

to the undercarriage of a car constituted a trespass into one of the defendant's "effects," and thus, a warrantless search occurred in violation of the Fourth Amendment.[9]

B. *Katz's* Reasonable Expectation of Privacy Test

When confronted with new technologies that enabled the government to acquire an individual's private information absent any physical intrusion, the Supreme Court recognized the inadequacies of the common-law trespass test and adopted a new search doctrine that protected "people, not places."[10]

In *Katz*, the Supreme Court held that government officials engaged in an unreasonable search by placing a hidden electronic listening device in a public telephone booth to listen to the defendant's telephone conversation.[11] Justice Harlan's concurring opinion established that "a person has a constitutionally protected *reasonable expectation of privacy*" and created a two-prong test for determining when that expectation exists.[12]

The first prong of the *Katz* test requires a person to have exhibited a subjective expectation of privacy[13]—by fencing in their property or closing the telephone booth door, for example. The second prong requires that the individual's subjective expectation be one that society is prepared to recognize as objectively reasonable.[14] Thus, the pertinent question under the *Katz* test becomes

[9] *Id.* (holding that when "[t]he Government physically occupie[s] private property for the purpose of obtaining information" there is "no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted.").

[10] *Katz*, 389 U.S., at 351 (rejecting the argument that a Fourth Amendment violation turned on whether a physical trespass had occurred).

[11] *Id.* at 349.

[12] *Id.* at 361 (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.").

[13] *Id.*

[14] *Id.*

whether police "violated the privacy upon which [the defendant] justifiably relied."[15] Accordingly, if a reasonable expectation of privacy exists, law enforcement generally needs to obtain a warrant before intruding on that interest.

Furthermore, in *Jones* the Supreme Court clarified that "*Katz's* reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it."[16] Accordingly, law enforcement must comport with both the *Jones* and *Katz* frameworks when surveilling individuals with drones.

II. Drone Surveillance Should Comply with FAA Regulations to Avoid Violating an Individual's Reasonable Expectation of Privacy

In a triad of cases, the Supreme Court suggested that when conducting aerial surveillance, law enforcement must comply with aircraft laws and FAA regulations to avoid violating an individual's reasonable expectation of privacy.[17] Although these cases considered surveillance from helicopters and airplanes, some courts have applied this principle to drone surveillance. Accordingly, only properly licensed DHS entities should operate drones in accordance with FAA unmanned aircraft systems regulations.[18]

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[15] *Id.* at 353; *see also Florida. v. Riley*, 488 U.S. 456 (1989) (Brennan, J., dissenting).

[16] *Jones*, 565 U.S., at 414.

[17] *See Riley*, 488 U.S., 452 (holding in a plurality opinion that aerial observations from a police officer in a helicopter to did constitute a "search," but a majority of justices - four dissenting justices and Justice O'Connor – agreed that the police's compliance with FAA regulations was a nondispositive factor in the case) (O'Connor, S., concurring) (Brennan, J., dissenting) (Blackmun, J., dissenting); *see also California v. Ciraolo,* 476 U.S. 207, 214 (1986); *Dow Chemical Co. v. U.S.*, 476 U.S. 227, 239 (1986); Brandon Nagy, *Why They Can Watch You: Assessing the Constitutionality of Warrantless Unmanned Aerial Surveillance by Law Enforcement*, 29 BERKELEY. TECH. L.J. 135, 155 (2014).

[18] *See e.g.*, FAA Reauthorization Act of 2018, P.L. 115-254, 132 Stat. 3186; 14 C.F.R. § 107 (FAA regulation for "Small Unmanned Aircraft Systems"); 44 U.S.C. § 44809 ("Exception for limited recreational operations of unmanned aircraft").

In addition to federal laws and regulations, states have increasingly enacted laws regulating both recreational and law enforcement drone usage – for example, Alaska prohibits LE from deploying a drone to aid in a criminal investigation, in absence of a search warrant or search warrant exception. *See* Alaska Stat. § 18.65.902. However, it remains unclear how federal courts will, if at all, factor these state laws when analyzing a federal LEO's compliance with flight laws. *See Dow*, 476 U.S., at 232 ("That such photography might be barred by state law with regard to competitors, however, is irrelevant

In *California v. Ciraolo*, the Supreme Court held an individual did not have a reasonable expectation of privacy from observations made from an airplane flying 1,000 feet above, therefore law enforcement officers did not conduct a "search" of the defendant's property.[19] The Supreme Court applied the *Katz* test, concluding that the defendant's expectation of privacy was not objectively reasonable because any member of the public could have made the same observations as the police officers.[20] The court reasoned that "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares" and "[w]hat a person knowingly exposes to the public … is not a subject of Fourth Amendment protection."[21] Notably, the Supreme Court opined that the police officers were "lawfully operating" the aircraft within "public navigable airspace," and were not precluded from making observations where they "had a right to be."[22]

In *Dow Chemical v. United States* (decided on the same day as *Ciraolo*), the Supreme Court held that the owner of a manufacturing plant did not have a reasonable expectation of privacy from telescopic observations made from an airplane that was "lawfully in the public airspace."[23]

Three years later in *Florida v. Riley*, the Supreme Court held that law enforcement officers did not conduct a Fourth Amendment search when they flew a helicopter 400 feet overhead to view a greenhouse located on the defendant's property.[24] Relying on *Ciraolo*, the plurality concluded that

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to the questions presented here. State tort law governing unfair competition does not define the limits of the Fourth Amendment.").

[19] *Ciraolo*, 476 U.S., at 214.

[20] *Id.* at 213-14 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection… Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.").

[21] *Id.* at 213.

[22] *Id.*

[23] *Dow*, 476 U.S., at 239 (EPA officials used a precision aerial mapping camera to take magnifiable photographs from 12,000, 3,000, and 1,200 feet – all lawfully within navigable airspace.)

[24] *Id.* at 452.

the defendant "could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the *navigable* airspace."[25] The plurality stated that it was "of obvious importance that the helicopter in this case was not violating the law," specifically opining:

> We would have a different case if flying at that altitude had been contrary to law or regulation. But helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft. Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse.[26]

Some courts have applied *Ciraolo*, *Dow*, and *Riley*, to drone surveillance operations.[27] In *Long Lake Township v. Maxon*, a Michigan state appellate court held that deploying a drone to photograph the defendant's backyard violated the Fourth Amendment, reasoning that "[a]lthough noncompliance with FAA regulations does not [*per se*] establish a Fourth Amendment violation, such regulations are relevant to what a person might reasonably expect to occur overhead."[28]

In another case, a federal district court found—in a civil lawsuit—that an individual plausibly alleged that law enforcement's drone surveillance intruded upon their reasonable expectation of privacy, in part because "the drone was operated in a manner that is not in compliance with federal and state aerial regulations."[29]

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[25] *Id.* at 450-451.

[26] *Id.* at 451.

[27] *See Long Lake Twp. v. Maxon*, 336 Mich. App. 521, 534-539 (2021) *vacated and remanded on other grounds*, 509 Mich. 981 (2022) (holding that a warrantless drone surveillance operation violated an individual's reasonable expectation of privacy because of three factors: (1) law enforcement's noncompliance with FAA regulations, (2) the qualitative differences of drones as compared to helicopters and airplanes, and (3) the trespassory nature of the low-altitude flight.); *Dircks v. Indiana Dep't of Child Servs.*, No. 1:21-CV-00451-JMS-MG, 2022 WL 742435, at *17 (S.D. Ind. Mar. 11, 2022) (in a civil lawsuit, the court denied a motion to dismiss reasoning that although law enforcements "noncompliance with federal aviation regulations does not itself establish a Fourth Amendment violation, such regulations are relevant to what a person might reasonably expect to occur overhead.").

[28] *Long Lake*, 336 Mich. App., at 534-539.

[29] *Dircks*, at *17 ("Plaintiffs have plausibly alleged that the drone was operated in a manner that is not in compliance with federal and state aerial regulations. Although noncompliance with federal aviation regulations does not itself establish a Fourth Amendment violation, such regulations are relevant to what a person might reasonably expect to occur overhead.") The plaintiff alleged a violation of 14 C.F.R. § 107.31, which requires a drone operator to maintain a visual line of site with the drone.

This memorandum does not attempt to identify and provide a comprehensive analysis of all regulations and laws relevant to drone flights, but key regulations include minimum and maximum flight altitudes; weight, and speed requirements;[30] line-of-sight requirements;[31] restrictions near stadiums, airports, in Washington, D.C., and other airspaces;[32] operator certification requirements;[33] and prohibitions on flights above people and moving vehicles.[34]

A small handful of courts have found *Ciraolo*, *Dow*, and *Riley* inapplicable to drone operations because drones are qualitatively and inherently different than helicopters and airplanes—arguing that drones are smaller, quieter, less noticeable, remotely operated, maneuverable in small places, and navigable at lower heights, making their use more intrusive upon an individual's reasonable expectation of privacy.[35] Although this argument may have merit, as Justice Brennan presciently alluded to in his *Riley* dissent,[36] no federal court has adopted this approach—or any other

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[30] *See 14 C.F.R. § 107.51,*

[31] *See 14 C.F.R. §* 107.31. Upon application, the FAA may waive this requirement for law enforcement entities responding to "extreme emergency situations to safeguard human life." *See* 14 CFR 91.113(b).

[32] *See 14 C.F.R. §* 107.41, 43, 45, 47.

[33] *See 14 C.F.R. §* 107.63.

[34] *See 14 C.F.R. §* 107.39, 145.

[35] *See Dircks*, at *18 (denying a motion to dismiss, in part because "drones are inherently different in character than helicopters and airplanes."); *Long Lake*, 336 Mich. App, at 538 ("low-altitude, unmanned, specifically targeted drone surveillance of a private individual's property is qualitatively different from the kinds of human-operated aircraft overflights permitted by *Ciraolo* and *Riley*."); *State v. Stevens*, 2023 WL 2567637 (Ohio App., 2023) (King, J., concurring) ("One can question whether *Riley* controls the federal constitutional analysis for aerial drones because there are obvious differences in the technologies… Compared to a helicopter, a drone is small, quiet, less noticeable, remotely operated, and maneuverable in small places. Further, a drone is seemingly able to conduct more intrusive surveillance than the naked eye could conduct from a helicopter. In other words, the technology deployed here is qualitatively different than the helicopter examined in *Riley*… Thus, the court should remain conscious of the difference in the technologies and not give carte blanch to the use of aerial drones merely because of *Riley*."); *but see Id.* at *6 ("While the use of drones as a tool for criminal investigations is currently an undeveloped area of the law, we find no reason to distinguish the use of the drone in this case from other air surveillance. Nothing in the record suggests the drone in the instance case, flying at an altitude of 300-396 feet, is more intrusive than the helicopter flying at 400 feet in *Riley*.").

[36] *Riley*, 488 U.S., at 462–63 (Brennan, J., dissenting) ("Imagine a helicopter capable of hovering just above an enclosed courtyard or patio without generating any noise, wind, or dust at all—and, for good measure, without posing any threat of injury. Suppose the police employed this miraculous tool to discover not only what crops people were growing in their greenhouses, but also what books they were reading and who their dinner guests were. Suppose, finally, that the FAA regulations remained unchanged, so that the police were undeniably 'where they had a right to be.' Would today's plurality continue to assert that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' was not infringed by such surveillance?").

rationale (*see infra* Section II and III) – to find drone surveillance unconstitutional under the Fourth Amendment.[37]

III. Prolonged and Extensive Drone Surveillance May Violate an Individual's Reasonable Expectation of Privacy under *Carpenter*

Pursuant to *Ciraolo*, *Dow*, and *Riley*, courts generally permit warrantless *short-term* aerial surveillance of a person or home,[38] however prolonged and extensive drone surveillance may violate an individual's reasonable expectation of privacy under *Carpenter's* "whole-of-movement" doctrine—positing that law enforcement engages in a Fourth Amendment search by aggregating the "whole" of person's public activities, despite an individual having no reasonable expectation of privacy in any of those activities individually.[39] In other words, *Carpenter* captures the idea that "when it comes to people's reasonable expectations of privacy, the whole is greater than the sum of its parts."[40]

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[37] A Westlaw search of ["drone" AND "warrantless"] yielded no federal cases to support this proposition.

[38] *See supra* Section II.

[39] *See Carpenter* 138 S. Ct, at 2219 ("[W]hen the Government accessed [cell-sit location information] from the wireless carriers, it invaded [the defendant's] reasonable expectation of privacy in the whole of his physical movements"); *Id.* at 2217 ("A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. A majority of this Court [in *Jones*] has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements.").

[40] *See United States v. Tuggle*, 4 F.4th 505, 517 (7th Cir. 2021); *see also United States v. Maynard*, 615 F.3d 544, 561-62 (D.C. Cir. 2010), *aff'd in part sub nom. United States v. Jones*, 565 U.S. 400 (2012) (Credited with first articulating the "whole-of-movement" privacy doctrine):

> [T]he whole of one's movements over the course of a month . . . reveals more — sometimes a great deal more — than does the sum of its parts. . . . *Prolonged surveillance reveals types of information not revealed by short-term surveillance*, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more; a single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups — and not just one such fact about a person, but all such facts.

In *Carpenter*, the Supreme Court recognized a "seismic shift" in technology that "enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes."[41] The court held that police "invaded [the defendant's] reasonable expectation of privacy in the whole of his physical movements" when they, without a warrant, acquired the defendant's cell-site location information from a wireless service provider.[42] The court reasoned that acquiring the defendant's cell-site location information[43] constituted a search because "the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations."[44] In the words of the Fourth Circuit Court of Appeals, "*Carpenter* solidified the line between short-term tracking of public movements—akin to what law enforcement could do [p]rior to the digital age—and prolonged tracking that can reveal intimate details through habits and patterns."[45]

In *Leaders of a Beautiful Struggle v. Baltimore Police Department,* the Fourth Circuit Court of Appeals applied *Carpenter* when considering how an expansive network of small surveillance planes, continuously surveilling and recording a 32 square mile area in Baltimore, implicated the Fourth Amendment.[46] Initially, the Fourth Circuit Court of Appeals held that this aerial surveillance

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[41] *Carpenter,* 138 S.Ct., at 2219, 2214.

[42] *Id*.

[43] Cell-site location information ("CSLI") refers to the metadata generated when a cell phone connects to a nearby cell tower and can provide a detailed log of an individual's past movements. *See United States v. Goldstein,* 914 F.3d 200, 202 (3d Cir. 2019).

[44] *Carpenter,* 138 S.Ct., at 2217-2219.

[45] *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 341 (4th Cir. 2021).

[46] The Arial Investigation Research ("AIR") program used aerial photography to track movements related to serious crimes. Multiple planes fly distinct orbits above Baltimore, equipped with telescopic camera technology capturing roughly 32 square miles per image per second. The planes flew at least 40 hours a week during daylight hours, obtaining an estimated twelve hours of coverage of around 90% of the Baltimore each day. The photographic resolution of the images were intentionally limited to avoid detecting personally identifying information. Any single AIR image—captured once per second—included around 32 square miles of Baltimore and could be magnified to a point where people and cars are individually visible, but only as blurred dots or blobs. *Id* at 334.

program did not violate individuals' reasonable expectations of privacy, largely reasoning its decision on the aerial surveillance precedents of *Ciraolo*, *Dow*, and *Riley*.[47]

However, after a rehearing *en banc*, the Fourth Circuit Court of Appeals reversed its decision, holding that the surveillance program ran afoul *Carpenter* because it "open[ed] an intimate window into a person's associations and activities," thereby violating the reasonable expectation of privacy individuals maintain in the "whole of their movements."[48] The court reasoned that the extensive photographic and retrospective location tracking program yielded "a wealth of detail" that enabled law enforcement officials to make deductions about an individual's private life.[49]

Nevertheless, *Leaders of a Beautiful Struggle* should have little impact on law enforcement's short-term drone surveillance practices because short-term surveillance does not produce the "wealth of detail" about an individual's private life that implicates *Carpenter*. Furthermore, assuming that law enforcement could deploy drones for long-term surveillance (either with advanced battery technology, leveraging multiple drones, or pairing drones with fixed cameras courts), courts will likely permit longer-term done surveillance of a home when used in a stationary and static manner, akin to the long-term pole-surveillance operations that federal circuit courts of appeals have consistently upheld.[50]

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[47] *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 979 F.3d 219, 227-228 (4th Cir. 2020), *on reh'g en banc*, 2 F.4th 330 (4th Cir. 2021) ("In light of these precedents [*Ciraolo*, *Dow*, and *Riley*], we cannot hold that AIR violates a reasonable expectation of privacy. AIR is merely a tool used to track short-term movements in public, where the expectation of privacy is lessened. Such an activity is lawful in light of *Knotts* and *Jones*. And the specific tool which the BPD will use for the surveillance, aerial photography, has been sanctioned by the Supreme Court in several cases.").

[48] *Leaders of a Beautiful Struggle*, 2 F.4th, at 342.

[49] *Id*.

[50] *See United States v. Dennis*, 41 F.4th 732 (5th Cir. 2022) (finding two months of pole camera surveillance trained on the rear of defendants fenced in home did not constitute a Fourth Amendment violation); *Tuggle*, 4 F.4th, at 517-529 (analyzing pole mounted surveille cameras under *Carpenter* and "mosaic theory" principles, holding that 18 months of video surveillance with a pole camera trained on defendant's home did not violate defendant's reasonable expectation of privacy); *United States v. Trice*, 966 F.3d 506, 518-519 (6th Cir. 2020) (holding that law enforcement did not violate an individual's reasonable expectation of privacy by placing a motion-activated camera in a commonly shared apartment hallway, because its short-term and limited use "did not provide the type of comprehensive monitoring at issue in *Carpenter*."); *United States v. Moore-Bush*, 36 F.4th 320 (1st Cir. 2022) (*en banc*) (upholding eight months of pole camera surveillance); *United States v. May-Shaw*, 955 F.3d 563 (6th Cir. 2020) (upholding 23 days of pole camera surveillance).

However, despite courts declining to extend *Carpenter's* expressly narrow holding[51] to pole-surveillance cameras,[52] automatic license plate readers,[53] and IP addresses,[54] prolonged drone surveillance that monitors all a target's public movements may potentially violate *Carpenter*. Unlike, stationary pole cameras that typically only capture a "sliver" of someone's life,[55] navigable drones that continuously monitor and track a target over long distances capture a far greater amount of an individual's life—a surveillance practice more closely resembling the GPS data in *Jones*, cell-site data location in *Carpenter*, and the AIR program in *Leaders of a Beautiful Struggle*. Frequent and prolonged drone surveillance of an individual's home *and* their public activities could run afoul to *Carpenter* by allowing law enforcement to open an "intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations."[56] Although nonbinding, Alito's concurrence in *Jones* suggests that continuous public monitoring of an individual for four weeks, "surely" would constitute a search.[57]

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[51] *Carpenter*, 138 S.Ct., at 2220 ("Our decision today is a narrow one. We do not … call into question conventional surveillance techniques and tools, such as security cameras … the Court must tread carefully … to ensure that we do not embarrass the future.").

[52] *See Tuggle*, 4 F.4th, at 524 ("The stationary cameras placed around Tuggle's house captured an important sliver of Tuggle's life, but they did not paint the type of exhaustive picture of his every movement that the Supreme Court has frowned upon. If the facts and concurrences of *Jones* and *Carpenter* set the benchmarks, then the surveillance in this case pales in comparison.").

[53] *See United States v. Bowers*, No. 2:18-CR-00292-DWA, 2021 WL 4775977, at *3 (W.D. Pa. Oct. 11, 2021)("The ALPR technology at issue captures only the public movements of vehicles that happen to pass by locations on a public street in view of an ALPR camera. Moreover, the cameras capture a snapshot of the rear of the vehicles as they pass by and cannot follow the vehicles or record their every movement. Even in the aggregate, the ALPR cameras 'capability to capture multiple shots of a single vehicle and/or store historical data does not approach the near-constant surveillance of cell-phone users' public and private moves that so concerned the Court in *Carpenter*. Rather, the technology is more akin to the conventional surveillance methods, such as security cameras, that the *Carpenter* Court was careful not to call into question.").

[54] *See United States v. Hood*, 920 F.3d 87 (1st Cir. 2019)

[55] *Tuggle*, 4 F.4th, at 524.

[56] *Carpenter*, 138 S. Ct., at 2217. *See also Leaders of a Beautiful Struggle*, 2 F.4th, at 341; *Dow*, 476 U.S., at 238 ("[T]he photographs here are not so revealing of intimate details as to raise constitutional concerns."); *see also Kyllo v. United States*, 533 U.S. 27, 36–37 (2001) ("the novel proposition that inference insulates a search is blatantly contrary to *United States v. Karo*, where the police "inferred" from the activation of a beeper that a certain can of ether was in the home. The police activity was held to be a search, and the search was held unlawful.").

[57] *Jones*, 565 U.S., at 430 (Alito, S., concurring) ("We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4–week mark.").

Although such extensive drone surveillance is unlikely, and maybe not even possible with the current state of the technology, DHS law enforcement officers should balance the duration, frequency, and scope of any drone surveillance to avoid violating "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalog every single movement" of their public life.[58]

IV. Low-Altitude Drone Flights May Constitute an Aerial Trespass and Require a Warrant under *Jones*

As discussed in Section I, the Supreme Court reaffirmed the common-law trespass doctrine in *Jones*, holding that a governmental trespass upon an individual's property to obtain information constitutes a search, and thus requires a warrant or warrant exception. Although largely unsettled and unaddressed, some courts have opined in dicta that flying drones above an individual's property could constitute an "aerial trespass" and warrant skepticism under the *Jones* test.[59]

Under the early common law, property ownership extended from the core of the Earth to the outer atmosphere[60] and "any intrusion into the space above another's land was a trespass whether by

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[58] *Carpenter*, 138 S. Ct., at 2217.

[59] *See Matter of United States*, No. 5:22-MJ-02005-RN, 2022 WL 16757941 at *7 (E.D.N.C. Oct. 26, 2022) ("At first blush, the use of unmanned drones to surveil property without a warrant occupies a grey area between [*Jones* and *Katz*]… at some altitude below navigable airspace, a flying drone looks less like a necessary exception to the common-law rule and more like trespass …Without trying to fashion a bright-line rule … at some altitude below navigable airspace, flying a drone above someone's property constitutes a trespass."); *Long Lake*, 336 Mich. App., at 539 ("landowners are still entitled to ownership of some airspace above their properties, and intrusions into that airspace will constitute a trespass no different from an intrusion upon the land itself. Drones fly below what is usually considered public or navigable airspace. Consequently, flying them at legal altitudes over another person's property without permission or a warrant would reasonably be expected to constitute a trespass."); *State v. Stevens*, 2023 WL 2567637 at *6 (Ohio App. 5 Dist., 2023) (King, J., concurring) ("The *Jones* test applied to drone surveillance would suggest a different result than under the plurality's approach to helicopter aerial surveillance addressed in *Riley*. Under the common law *ad coelum* doctrine, a property owner's rights extend above and below the surface. It follows then, if the surreptitious attachment of a GPS tracking device to a vehicle parked in a public place is a trespass that would be recognized under the common law, then it would seem flying a drone that physically intrudes into a property owner's common law airspace should also be recognized as a trespass under *Jones*.").

[60] *U.S. v. Causby*, 328 U.S. 256, 260–61 (1946) ("It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*.").

the extension of an arm, the growth of a tree, the projection of the eves of a house, or the firing of a gun."[61] However, with the advent of commercial air travel, the Supreme Court abandoned this rule and declared that "[t]he air is a public highway."[62] Accordingly, the Supreme Court adopted the "enveloping atmosphere rule" – holding that aerial property rights extend only so far as an owner can reasonably use for the enjoyment of their property.[63] The Court recognized that aerial property rights includes the airspace necessary to erect buildings, plant trees, and run fences.[64] Accordingly, any invasion of this airspace constitutes a trespass.[65]

Although the supreme court held that aerial property rights exist, no authority clearly demarcates exactly how far this right extends[66] creating continued uncertainty regarding low-altitude airspace rights.[67]

Some courts have signaled support for applying *Jones* to low-altitude drone flights. In denying an All Writs Act application for an order authorizing drone surveillance, a federal district court opined that "at some altitude below navigable airspace, a flying drone looks less like a necessary exception to the common-law rule [based on property rights] and more like trespass… [and] at some altitude below navigable airspace, flying a drone above someone's property constitutes

[61] *Reynolds v. Wilson*, 67 Pa. D. & C. 286, 291 (Com. Pl. 1949).

[62] *Causby*, 328 U.S., at 264.

[63] *Id.* at 264 ("[I]f the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere… The landowner owns at least as much of the space above the ground as the can occupy or use in connection with the land.").

[64] *Id.*

[65] *Id.* at 265 ("The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.").

[66] *Id.* at 266 ("The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are.").

[67] *See* Lane Page, *Drone Trespass and the Line Separating the National Airspace and Private Property*, 86 GEO. WASH. L. REV. 1152, 1163 (2018) (arguing that because it is unclear how far airspace property rights extend, low-altitude drones flights currently operate in a "property rights no-man's land.").

a trespass."[68] The court further opined that the proposed drone operation would be "constitutionally suspect" and, without a search warrant, officers would "roll the dice on the admissibility of the evidence it finds."

In *Long Lake*, a Michigan appellate court held that a drone surveillance flight violated *Katz's* reasonable expectation of privacy protection, but opined in dicta that, because drones fly below what is usually considered public airspace, "flying them at legal altitudes over another person's property without permission or a warrant would reasonably be expected to constitute a trespass" which may constitute a violation of the Fourth Amendment.[69]

Although no bright-line rule exists, law enforcement should recognize the general principle that the closer they fly a drone to the surface of the property or near an individual's home, the more likely a court could find a *Jones* trespass. For example, flying a drone at or near surface level would clearly trespass on an individual's property.[70] Additionally, flying a drone below the height of the home (or the tallest structure on the property) may violate the "enveloping atmosphere" rule, because individuals routinely use the airspace near and below the height of their rooftop—to hang clotheslines, engage in activities (basketball, trampoline jumping, etc.), build treehouses, and conduct roof maintenance, for example.

Understanding that FAA regulations permit drones to fly at a maximum altitude of 400 feet,[71] DHS entities should aim to operate drones near that altitude (without exceeding it) if the mission

[68] *See Matter of United States*, No. 5:22-MJ-02005-RN, 2022 WL 16757941 at *7 (E.D.N.C. Oct. 26, 2022).

[69] *Long Lake*, 336 Mich. App., at 540.

[70] *Causby*, 328 U.S., at 264 ("[T]he flight of airplanes, which skim the surface [of the land] but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. ...[I]nvasions of it are in the same category as invasions of the surface.").

[71] *See* 14 C.F.R. § 107.51 ("The altitude of the small unmanned aircraft cannot be higher than 400 feet above ground level, unless the small unmanned aircraft: (1) Is flown within a 400-foot radius of a structure; and (2) Does not fly higher than 400 feet above the structure's immediate uppermost limit.").

allows—not only is this sound operational security practice but it also best assures that any drone flight does not constitute an aerial trespass.

CONCLUSION

The current jurisprudential landscape generally allows for most short-term drone surveillance operations, including digitally magnified surveillance of homes and backyards. However, certain drone practices are more susceptible to Fourth Amendment challenges—either under current or developing doctrines. To minimize litigation risk when deploying drones, DHS entities should (1) comply with FAA and other aircraft regulations, (2) avoid prolonged and extensive drone surveillance operations that effectively track "every single movement" of an individual,[72] and (3) avoid flying drones into airspace that property owners can reasonably use for the enjoyment their property—*i.e.*, below the tallest structure on the property, at minimum.

[72] *See Carpenter*, 138 S. Ct., at 2217 ("[S]ociety's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.").

Applicant Details

First Name	**Richard**
Middle Initial	**J**
Last Name	**Sammartino**
Citizenship Status	**U. S. Citizen**
Email Address	**rjs12@illinois.edu**
Address	**Address** Street **55 E Green Street Apt. #504** City **Champaign** State/Territory **Illinois** Zip **61820** Country **United States**
Contact Phone Number	**3305091539**

Applicant Education

BA/BS From	**Ohio Wesleyan University**
Date of BA/BS	**December 2020**
JD/LLB From	**University of Illinois, College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp**
Date of JD/LLB	**May 11, 2024**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**Illinois Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hurd, Heidi
hhurd@illinois.edu
Moore, Michael
micmoore@law.uiuc.edu
217-244-7003

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Richard J. Sammartino
55 E Green St., Champaign, IL 61820-5363 • (330) 509-1539 • rjs12@illinois.edu

June 9, 2023

Hon. Stefan R. Underhill
United States Courthouse
915 Lafayette Boulevard
Suite 411
Bridgeport, Connecticut 06604

Dear Judge Underhill:

I write to apply for a 2024–2026 clerkship in your chambers. I am a rising 3L at the University of Illinois College of Law and an Articles Editor of the University of Illinois Law Review. I am also a summer associate at the firm of Meyer Capel in Champaign, Illinois. As someone fascinated by American history, especially the American Revolution and the Founding, I am thrilled at the prospect of clerking in Connecticut. Many of my close friends have lived in Connecticut and speak highly of the state. Moving to Bridgeport to clerk in your chambers would be an honor.

My path to law school was idiosyncratic. As an undergraduate, I aspired to become a theologian. After graduation, Harvard Divinity School accepted me into its graduate program; however, following much discernment, I decided to attend law school. I had hoped that law school would provide a foundation for future graduate work in moral and political theology. Instead, law school defied my expectations, and studying blackletter law proved as edifying as studying theology.

Today, my aspirations have changed. Instead of pursuing an academic career in theology, I hope to work as a civil litigator or federal prosecutor. Nonetheless, the scholarly aspects of law still fascinate me. In the coming months, Professor Heidi Hurd and I will be writing a paper contrasting the moral authority claimed by secular and religious legal codes. We also have plans to write an environmental law and ethics piece. Whatever my ultimate career path, I plan to make time for scholarly pursuits; like others before me, I hope that the law will be both my professional and intellectual vocation.

The University of Illinois has prepared me well to be a law clerk. Through Illinois's judicial opinion writing class, I studied the role of a law clerk, the process of judicial decision making, and the writing style of many eminent judges. My studies have convinced me that the principal duty of law clerks is to provide judges with a reliable analysis of the law and reasoned arguments capable of withstanding the highest scrutiny, and to do so in precise, clear English. I believe that my writing sample, a draft opinion, evinces my commitment to these principles and is reflective of the work that I would do as a law clerk in your chambers.

I enclose my résumé, law school transcript, writing sample, and list of references. Professors Heidi Hurd and Michael Moore have provided letters of recommendation on my behalf. I would be honored to serve as a law clerk in Bridgeport. Thank you for considering my application.

Sincerely,

/s/ Richard J. Sammartino

Richard J. Sammartino

55 E Green St., Champaign, IL 61820-5363 • (330) 509-1539 • rjs12@illinois.edu

EDUCATION

University of Illinois College of Law: Urbana-Champaign, Illinois
Juris Doctor, Expected May 2024
GPA: 3.50/4.0 (Top 33%)

- *University of Illinois Law Review*, Articles Editor
- Illinois Program in Law & Philosophy Fellow
- Illinois Jurisprudence Society, Co-Founder & President-Emeritus
- ABA Law Student Division Negotiation Competition (School Finalist, 2021 and 2022)
- Environmental Law Study Abroad, Monteverde Institute, Costa Rica (January 2023)
- CALI High "A" Award in Criminal Practice Ethics

Ohio Wesleyan University: Delaware, Ohio
Bachelor of Arts, *magna cum laude*, December 2020
GPA: 3.86/4.0; Dean's List (3.5+ GPA), 6 out of 6 semesters

- Departmental Honors in Classics
- Theta Alpha Kappa Honor Society for Students of Religion & Theology
- Eta Sigma Phi Honor Society for Students of Latin & Greek

WORK EXPERIENCE

Meyer Capel, a Professional Corporation Summer 2023
Summer Associate

- Researches and prepares memoranda for attorneys across Meyer Capel's eighteen practice areas, including transactional and litigious matters concerning federal and state law.

Panos & Associates, LLC: Palos Heights, Illinois January 2023–Present
Law Clerk

- Researches and prepares memoranda in several areas of family law, including disputes arising under the Illinois Uniform Premarital Agreement Act, the Illinois Marriage and Dissolution of Marriage Act, the declaratory judgement provisions of the Illinois Code of Civil Procedure, and contract interpretation relating to pre- and post-marital agreements.
- Assists in drafting motions, responses, and briefs to trial and appellate courts.

U.S. District Court for the Northern District of Ohio: Cleveland, Ohio Summer 2022
Judicial Extern to the Honorable J. Philip Calabrese

- Drafted judicial opinion responding to a Magistrate Judge's Report & Recommendation concerning a petition for a writ of habeas corpus.
- Drafted portions of judicial opinions, orders, injunctions, and other court documents.
- Researched Federal Habeas Corpus Practice and Procedure; the Anti-Terrorism & Effective Death Penalty Act; the Sentencing Reform Act; the Uniform Trade Secrets Act; the False Claims Act; the Federal Rules of Evidence; *Markman* hearings; various forms of alternate dispute resolution; the Federal Rules of Appellate Procedure; sections of the Ohio Revised Code governing collateral post-conviction review; case law concerning all the aforementioned statutes; and other questions of law assigned by the judge.
- Attended hearings, trials, and conferences; discussed effective advocacy with judge.

Giant Eagle Supermarket: Austintown, Ohio January 2021 – August 2021
Personal Shopper

- Filled online orders for groceries, stocked shelves, cleaned store, assisted customers on sales floor, took customer phone calls, and performed other duties as assigned.

INTERESTS

- Italian Cooking
- Classical Languages & Literature (Latin, Ancient Greek, Biblical Hebrew)

Richard J. Sammartino

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ACADEMIC REFERENCES

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PROFESSIONAL REFERENCES

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COPY COPY COPY COPY

Date Printed: Jun 8, 2023

Name: Sammartino, Mr. Richard James

Program/Degree/Curriculum:
Undergraduate/Bachelor of Arts/Classics Major
Undergraduate/Minor/Religion Minor

Degree Awarded:
Bachelor of Arts
Minor

Date Granted:
Dec 30, 2020
Dec 30, 2020

Previous Institution: Boardman High School

Honors: Magna Cum Laude
Cumulative GPA: 3.86

Course Id	Title	Grade	Credits	QPnts
Other Credit 2016 (Jan 1, 2016 - Dec 31, 2016)				
College Board				
ENG 105	Freshman Writing Sem	CR	1.00	2.00
HIST 113	Int-Early Am Hist t	CR	1.00	2.00
HIST 114	Introduction to Mode	CR	1.00	2.00
HIST 120	Adv Plcmnt Wrld His	CR	1.00	2.00
PG 111	AP Politics & Govern	CR	1.00	2.00

	Attempt	Earned	Total	GPACrd	QPnts	GPA
Term	0.00	0.00	5.00	0.00	0.00	0.00
Cum	0.00	0.00	5.00	0.00	0.00	0.00

Other Credit 2017 (Jan 1, 2017 - Dec 31, 2017)				
College Board				
ENG 001	Introduction to Lite	CR	1.00	2.00
GEOG 110	Cultural Geography	CR	1.00	2.00
GEOG 110	DIVERSITY REQ	S	0.00	0.00
HIST 112	Introduction to Mode	CR	1.00	2.00
PG 113	Democracy, Dictators	CR	1.00	2.00
PSYC 110	Introduction to Psyc	CR	1.00	2.00

	Attempt	Earned	Total	GPACrd	QPnts	GPA
Term	0.00	0.00	5.00	0.00	0.00	0.00
Cum	0.00	0.00	10.00	0.00	0.00	0.00

Fall 2017 (Aug 23, 2017 - Dec 14, 2017)				
ECON 110	Principles Economics	B	1.00	3.00
ECON 110	QUANTITATIVE REQ	S	0.00	0.00
GEOL 110	Physical&Enviro Geol	B+	1.00	3.33
LATI 110	Beginning Latin I	A-	1.00	3.67
REL 121	New Testt Hist&Lit	A	1.00	4.00
UC 160	The OWU Experience	A	0.25	1.00

Deans List

	Attempt	Earned	Total	GPACrd	QPnts	GPA
Term	4.25	4.25	4.25	4.25	15.00	3.53
Cum	4.25	4.25	14.25	4.25	15.00	3.53

Fall 2018 (Aug 22, 2018 - Dec 13, 2018)				
ART 110	Survey Art History I	A	1.00	4.00
GEOL 112	History of the Earth	B+	1.00	3.33
GREE 110	Intro-Class Greek I	A-	1.00	3.67
REL 322	Paul & His Epistles	A	1.00	4.00

Michael Schoen
University Registrar

Course Id	Title	Grade	Credits	QPnts
Fall 2018 (Aug 22, 2018 - Dec 13, 2018)				
REL 391	Biblical Hebrew	A	1.00	4.00

	Attempt	Earned	Total	GPACrd	QPnts	GPA
Term	5.00	5.00	5.00	5.00	19.00	3.80
Cum	9.25	9.25	19.25	9.25	34.00	3.68

Spring 2019 (Jan 16, 2019 - May 7, 2019)				
CLAS 321	Roman Republic	A	1.00	4.00
CLAS 321	WRITING REQ	S	0.00	0.00
GREE 111	Intro-Class Greek II	A	1.00	4.00
LATI 111	Beginning Latin II	A	1.00	4.00
REL 332	The Reformation Era	A-	1.00	3.67
REL 332	WRITING OPT	S	0.00	0.00
REL 391 2	Biblical Hebrew II	A	1.00	4.00

Deans List

	Attempt	Earned	Total	GPACrd	QPnts	GPA
Term	5.00	5.00	5.00	5.00	19.67	3.93
Cum	14.25	14.25	24.25	14.25	53.67	3.77

Fall 2019 (Aug 21, 2019 - Dec 12, 2019)				
CLAS 322	Roman Empire	A	1.00	4.00
CLAS 322	WRITING OPTION	S	0.00	0.00
GREE 491	Directed Readings	A	1.00	4.00
LATI 490	Independent Study	A	1.00	4.00
REL 270	Thry&Meth Stdy Relig	A+	1.00	4.00
REL 490	IS: 3rd Sem Biblical	A	1.00	4.00

Deans List, Good Standing

	Attempt	Earned	Total	GPACrd	QPnts	GPA
Term	5.00	5.00	5.00	5.00	20.00	4.00
Cum	19.25	19.25	29.25	19.25	73.67	3.83

Spring 2020 (Jan 15, 2020 - May 5, 2020)				
ASTR 110	Sky & Solar System	A	1.00	4.00
CLAS 319	Alexander the Great	A	1.00	4.00
GREE 490	Independent Study	A	1.00	4.00
LATI 330	LatRdgs:Lucretius	A-	1.00	3.67
LATI 490	Independent Study	A	1.00	4.00

* * * CONTINUED ON NEXT PAGE * * *

Authorized Signature

Date Processed

IN ACCORDANCE WITH THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974, AS AMENDED, TRANSCRIPTS MAY NOT BE RELEASED TO A THIRD PARTY WITHOUT THE WRITTEN CONSENT OF THE STUDENT

COPY

Date Printed: Jun 8, 2023

Name: Sammartino, Mr. Richard James

Program/Degree/Curriculum:
Undergraduate/Bachelor of Arts/Classics Major
Undergraduate/Minor/Religion Minor

Degree Awarded:
Bachelor of Arts
Minor

Date Granted:
Dec 30, 2020
Dec 30, 2020

Previous Institution: Boardman High School

Honors: Magna Cum Laude
Cumulative GPA: 3.86

Course Id	Title	Grade	Credits	QPnts
	Spring 2020 (Jan 15, 2020 - May 5, 2020)			
UC 195	Counsl&Stu Per Wrk H	**S**	0.50	1.00

Deans List

	Attempt	Earned	Total	GPACrd	QPnts	GPA
Term	5.50	5.50	5.50	5.00	19.67	3.93
Cum	24.75	24.75	34.75	24.25	93.34	3.85

HYBRID INSTRUCTION (COVID)

	Fall 2020 (Aug 20, 2020 - Dec 11, 2020)			
CLAS 310	Archaic&ClasGreece	**A**	1.00	4.00
GREE 490	Independent Study	**A**	1.00	4.00
GREE 491	Directed Readings	**A-**	1.00	3.67
LATI 330	Lati Prose&Poetry	**A**	1.00	4.00
LATI 491	Directed Readings	**A**	1.00	4.00

Deans List

	Attempt	Earned	Total	GPACrd	QPnts	GPA
Term	5.00	5.00	5.00	5.00	19.67	3.93
Cum	29.75	29.75	39.75	29.25	113.01	3.86

HYBRID INSTRUCTION (COVID)

GRADUATION WITH DEPARTMENTAL HONORS
SENIOR MEMBER OF THETA ALPHA KAPPA

Total Credits Taken: 29.75
Total Transfer Credits: 10.00
Overall Credits: 39.75

End of Transcript

University Registrar

Course Id	Title	Grade	Credits	QPnts

Authorized Signature

Date Processed

IN ACCORDANCE WITH THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974, AS AMENDED, TRANSCRIPTS MAY NOT BE RELEASED TO A THIRD PARTY WITHOUT THE WRITTEN CONSENT OF THE STUDENT

University of College of Law
504 East Pennsylvania Avenue
Champaign, IL 61820

June 11, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Dear Judge Underhill:

I am writing to you today to recommend one of the University of Illinois College of Law's most remarkable students, Richard Sammartino. Every euphemism for "breaking the mold" applies to Richard; every adjective that is true of him requires exclamation marks. In my thirty+ years of teaching (at the University of Pennsylvania for many years where I was the Associate Dean, and then at the University of Illinois to which I moved as the Dean of the College of Law, with visits over the years at the University of Virginia, the University of Iowa, and the University of Alabama), I have never had a student like Richard. He is crazy smart, persistently curious, deeply intellectual, hilariously funny, bold bordering on occasionally brash, philosophically probing, doctrinally creative, and boundlessly energetic. His eccentricities are his greatest strengths: when you meet and spend time with Richard, you know that your life has been touched by someone extraordinarily special; maybe even someone for whom true greatness is possible.

Richard was headed to Harvard's Divinity School in the Fall of 2021 when at the last minute he decided that his passion for pursuing issues at the junction of thought and action would be better served by going to law school! And so, he pivoted and applied very late to law schools, and Illinois was fortunate enough to reel in this luckiest of catches. Richard began his 1L year in my Fall 2022 Torts course and unsurprisingly, he finished the course at the top of the class. But what he did that deserves real credit was single-handedly transform the academic and social dynamics of that 80-person class in ways that made the class "sing." He brought incredible life to the classroom, pressing wide-ranging questions about law and life before the start of classes in his signature booming voice; raising intriguing and very penetrating questions during class about the tensions he cleverly detected in the law; and passionately pursuing yet more questions after every class and during office hours with a vibrancy that drew classmates in and "gave them enough cover" to feel comfortable participating in outside-of-class discussions. But Richard's impact on the class culture did not stop at modeling what it means to be a deeply invested student. He went far further, organizing both social and intellectual events for the class that bonded his classmates together in a way I have never seen in a law school class in all my years. While most students who have big personalities in the 1L year alienate and annoy as many students as they charm, Richard singularly earned both respect and affection from his classmates because they so clearly appreciated that behind his soaring energy and astonishing intelligence is someone of deep integrity, warmth, and selflessness. I will be forever grateful to Richard for making my Fall 2022 Torts course the most rewarding teaching experience of my life. And his classmates would similarly extol the way he improved their other 1L courses.

I was delighted when Richard enrolled in the Study Abroad course that I taught in January 2023 called "Protecting Tropical Treasures: Environmental Law and Policy in Costa Rica." Once again, as I knew he would, he lifted the course, bringing to it a passionate curiosity to pursue in depth the many topics we took up during our ten days in Costa Rica. In his inimitable way, he "wowed" each of our guest lecturers, pressing them with questions that they said far outstripped those put to them by graduate students in the sciences with whom they regularly worked. The rest of the students in the course "upped their own games" as a result, which meant that everyone was energetically engaged in every lecture, fieldwork exercise, and activity throughout our days in the cloud forests, agricultural plantations, and Caribbean reef systems of Costa Rica. At the close of the course, my co-teacher, who is a distinguished wildlife biologist in Costa Rica, said that in his 40 years of teaching graduate students interested in environmental topics he had never worked with a group that was as "flat-out brilliant" as this group was. And I give Richard the credit for generating that "buzz," because his own extraordinary investment in the course motivated the same kind of interest and investment on the part of his classmates; and together, they were an impressively dynamic, inquisitive and ambitious group.

Richard has an eidetic memory and is a breathtaking fount of information on a dizzying array of topics. While he is never over-eager about sharing his mental library with others, if prompted, he can recount details of American history, principles of ecclesiastical law, resume-level biographies of famous judges, lawyers, and law professors, and the list goes on. It has always been a bit of a sport amongst his classmates to try to give him a topic about which he knows nothing. And they delight in the rare occasions when Richard cannot dazzle them with a mini-treatise on whatever subject they advance. Richard's ability to retain and instantly provide detailed information about material he has read—cases, statutes, secondary literatures, etc.—is one of the great gifts he gives to those who are fortunate enough to work with him. Working with Richard is like working with Google—if Google were smart enough to instantly appreciate the context of one's inquiry, the scope and depth of one's interest, the need to situate one's inquiry within larger literatures or relative to related topics, and the larger normative, economic, political, cultural, or social implications of one's topic.

Unsurprisingly, Richard's writing skills are as impressive as are his skills as a discussant and public speaker. Upon his return from Costa Rica, he wrote the very best research paper in the class, earning from me a very rare A+ with a piece that explored the ways in which Costa Rica's constitutionally enshrined standing doctrines vary from those in the United States so as to provide

greater opportunities to Costa Ricans to advocate for the protection of species and ecosystems. In classic form, Richard did not rest content with advancing a persuasive thesis that was well-informed by constitutional, statutory, and case law. He went further, drafting a surprisingly inventive but well-conceived and detailed model statute that he argued would go a good distance towards affording Americans a basis for environmental advocacy that would approximate that enjoyed by Costa Ricans. While most students cannot advance such bold proposals without their proposals being naively "pie-in-the-sky," Richard kept his argument and model statute admirably lawyerly, well-grounded, and procedurally and doctrinally realistic. It was an impressive display of mature thinking on a topic to which he was relatively new, and it once again demonstrated his unparalleled ability to absorb and synthesize large amounts of information, to think about it both critically and creatively, and to draw out of it a cogently crafted, elegantly organized, and deftly reasoned original thesis.

Richard will bring to a clerkship his zeal for learning, his lightning-fast processing skills, his organizational precision, his love of research, his skill for synthesizing complex materials, his attention to and concern for doctrinal and factual details, his excellent writing skills, and his enormous warmth and gregarious energy. If I were to trust my reputation and the integrity of my work to a fresh graduate from law school, I can think of no student in my past 35+ years of teaching who would better deserve my trust and reliance.

If there is any further information that I can give you about Richard, please do not hesitate to contact me at 217-493-3638 or hhurd@illinois.edu.

Sincerely,

Heidi M. Hurd
Ross and Helen Workman Chair in Law and Professor of Philosophy
Co-Director of the Program in Law and Philosophy

University of College of Law
504 East Pennsylvania Avenue
Champaign, IL 61820

June 11, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Dear Judge Underhill:

I have written a large number of judicial clerkship letters in my 54 years of law school teaching but none have been easier to write – or more of a pleasure to write – than to recommend Richard Sammartino to you for a judicial clerkship. Richard is a unique individual whom I have felt fortunate to have had as my student, once in my first year law class in criminal law (where he received an A-) and once in my Seminar in Legal Theory (where he received one of the two A's in the seminar).

Richard has done very well academically in law school but his grades do not fully capture why he is special. Rather, Richard's stellar characteristics are: his genuine curiosity about things legal; his boundless energy in pursuing his projects, intellectual and otherwise; his utter fearlesslness in speaking and arguing with those much his senior in every dimension; his extraordinary likability with his peers as well as his professors (when normally such outspoken confidence garners some resentment/envy from fellow law students but not in Richard's case because he is liked, admired, and even loved by his fellow students); and the analytic power of his thought. In my 54 years of teaching at over ten different law schools (Penn, Yale, Virginia, Harvard, Stanford, USC, Northwestern, Iowa, UC-Berkeley, etc.) I have had few if any students as memorable in these dimensions as is Richard.

Richard's only faults are the flip-side of his virtues. He can get carried away in the course of his arguments, speaking at a greater length than would make for an ideal exchange of ideas; he can get fixated on some one aspect of a problem that he won't let go of because he has not solved it to his own satisfaction; he can sound overconfident to those who have not yet understood his own quite acute self-understanding. These exaggerations of his virtues would not at all deter me if I were selecting clerks.

Let me illustrate what I have said by describing Richard's performance in my Legal Theory Seminar. This is not an ordinary seminar. I co-teach the seminar with my former colleague on the Penn faculty, Leo Katz. The seminar is taught on Zoom because the students are drawn not just from the Illinois and the Penn law schools, but also from Yale, UCLA, and a sprinkling of foreign law schools in Europe and South America. Leo and I teach the seminar with the authors of the works we have the students read and discuss, meaning that there are between 4 to 8 faculty members in the seminar at any given session. It is fair to say that the guest faculty members are the leading legal theorists in the English-speaking world. Many people (including many professors) find this setting intimidating. Not Richard – every week he was in the thick of our discussions, Richard forcefully but respectfully asking questions and pursuing what he did not understand. I received numerous comments from my fellow teachers in the seminar on his remarkable performances.

My other contacts with Richard have been through his organizing and then chairing the new Jurisprudence Society at the Illinois College of Law; his selection as a Law and Philosophy Fellow on the trip to New Orleans last fall for the annual national convention in Philosophy, Politics, and Economics; his participation in the "ideas dinners" I hold from time to time with a select group of students and faculty; and my supervision of his Illinois Law Review student note (on true Eighth Amendment meaning of Powell v. Texas, a matter on which the circuits are currently split). His performance in each of these settings has been of a piece with his performance in my Legal Theory Seminar.

I have never been a judge (although earlier in my career I spent a number of years teaching in continuing legal education programs for judges through the Federal Judicial Center, the California Center for Judicial Education and Research, the California Judges Association, and the Mississippi Institute for Advanced Judicial Studies); but if I were a judge I would welcome the chance to have someone as smart, energetic, and just downright interesting as Richard as my clerk.

The usual sign off for letters of this kind is of the form, "If I can provide any further information…." etc.; in this case, however, if more information is desired please call me. My private cell phone number is (217) 493-5996. Thank you for your consideration of Richard.

Sincerely

Michael S. Moore
Charles Walgreen University Professor of Law, Professor of
Philosophy and Professor in the Center for Advanced Study,
Co-Director of the Program in Law and Philosophy, University of Illinois

Richard J. Sammartino
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WRITING SAMPLE

Attached please find a copy of a Judicial Opinion. This document was prepared for the class Law 792: Judicial Opinion Writing. This Opinion addresses *People v. Washington*, an actual case pending before the Illinois Supreme Court. *Washington* concerns the statutory requirements for issuing a Certificate of Innocence. The case was brought by Wayne Washington, who was recently exonerated after serving nineteen years in prison for a murder that he did not commit. Washington was denied a Certificate of Innocence by the trial and appellate courts. He appeals that denial. The names of the justices appearing herein are fictional.

023 IL 128338

IN THE

SUPREME COURT

OF

THE STATE OF ILLINOIS

(Docket No. 128338)

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v.

WAYNE WASHINGTON, Petitioner-Appellant.

Opinion filed March 31, 2023.

JUSTICE PEA delivered the judgment of the court, with opinion.

Chief Justice Cheng and Justices Mackey, Powers, Schwartz, Bruno, and Woodruff joined in the judgment and opinion.

OPINION

In 1996, Wayne Washington pleaded guilty to a murder he did not commit. Nearly twenty years later, he was exonerated. Today, no one contests his innocence. When Washington petitioned the Circuit Court of Cook County for a Certificate of Innocence (COI) under Section 2-702(g) of the Illinois Code of Civil Procedure, he testified that his guilty plea was not voluntary. The court denied his petition, however, based on

prior testimony of which it took judicial notice *sua sponte*. Washington was denied a chance to address the court regarding his prior testimony. On appeal, the appellate court affirmed the denial. We subsequently granted leave to appeal pursuant to Illinois Supreme Court Rule 315. Ill. S. Ct. R. 315. We allowed the Innocence Project, the City of Chicago, and four others to file *amicus curiae* briefs. Ill. S. Ct. R. 345.

Two principal issues are presented here. The first issue whether Section 2-702(g) of the Code requires a petitioner to prove by a preponderance of the evidence that his guilty plea was involuntary to acquire a COI. We hold that is does. The second issue is whether Washington is entitled to a new hearing seeking a COI. This determination hinges on two questions: (1) whether a court, in a hearing seeking a COI, must consider the totality of the circumstances in deciding whether a petitioner's guilty plea was involuntary, and (2) whether a court must afford a petitioner an opportunity to address prior testimony of which the court took judicial notice under Section 2-207(f) of the Code. In both instances, we answer that a court must; consequently, we would have held that Washington is entitled to a new hearing. However, here we find that, despite its errors, a new hearing is not required because the circuit court abused its discretion in denying Washington's petition. Therefore, we remand to the circuit court with instructions to grant Washington a Certificate of Innocence.

I. STATEMENT OF FACTS

Petitioner Wayne Washington and Tyrone Hood were prosecuted for the murder of Marshall Morgan, Jr. Washington's 1996 jury trial ended in a mistrial. Hood was

tried, convicted, and sentenced to seventy-five years in prison. Washington then pleaded guilty in exchange for a twenty-five-year sentence.

In 2015, after Washington served his sentence, the Cook County State's Attorney's Office moved to vacate the sentences of both Washington and Hood and then dismissed the charges. Washington and Hood then filed COI petitions.

The circuit court held a joint evidentiary hearing. Hood and Washington both testified that they were innocent of Morgan's murder. Hood attached to his petition documents supporting the following: (1) a theory that Morgan's father killed Morgan to collect life insurance money; (2) that prosecution witness Jody Rogers claimed police coerced him to provide false testimony against Washington and Hood; and (3) that officers involved in the investigation of Washington and Hood involved the Fifth Amendment in civil litigation when questioned about interrogating Washington, Hood, and witnesses. The State did not contest the evidence or present any argument.

Washington testified that he falsely confessed to the murder after officers handcuffed him to a chair for several hours, slapped him, and pushed him over several times. He also submitted evidence that officers did the following: (1) slapped Hood and put a gun to his face; (2) beat Terry King, another suspect in the Morgan murder, and threatened him with a gun; (3) used a gun to threaten Joe West, another suspect in the Morgan murder; and (4) engaged in a systemic pattern of physical abuse toward subjects in other cases. The State did not contest the evidence.[1]

[1] Readers unfamiliar with the history of Cook County may benefit from our recounting the abuses committed by the Chicago Police Department during the 1970s, '80s, and '90's. With the benefit of

Hood argued that he proved his innocence through his uncontested testimony and by presenting substantial evidence that Marshall Morgan, Sr., had murdered Morgan. Washington adopted Hood's argument regarding innocence.

Washington sought to prove that he did not voluntarily cause his own conviction under the COI statute. He claimed that his plea was not voluntary because he was tortured by police, according to his undisputed testimony. Likewise, he asserted that he pleaded guilty because Hood had been convicted and sentenced to seventy-five years in prison. He explained his decision based on his reasoning that after serving a twenty-five-year sentence he might still have "a chance at life."

After the close of evidence in Washington and Hood's COI hearing, the circuit court asked to review the records from Washington's 1995 suppression hearing, Washington's 1996 jury trial, and Hood's trial. Washington and Hood objected, noting that the transcripts were not in evidence and their testimonies at the COI hearing stood undisputed. The circuit court then *sua sponte* took judicial notice of these materials. Washington and Hood were not given an opportunity to be heard regarding the judicially noticed materials.

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hindsight, now we know that when Washington and Hood were interrogated, the Chicago Police Department was engaged in the systemic torture of suspects to extract false confessions. One infamous example was Police Commander Jon Burge, who tortured or approved the torture of at least 118 people in police custody between 1972 and 1991. His reported actions, coupled with city officials' indifference, cost the City of Chicago more than $100 million in legal fees and reparations. When Burge's actions became public, Illinois courts exonerated thirteen death row inmates who had been falsely convicted. Governor George Ryan later pardoned four other death row inmates who had been convicted following interrogations by Burge's officers. After further investigations revealed the extent of police misconduct in Cook County, Governor Ryan placed a moratorium on capital punishment in Illinois in 2000. He later commuted the sentences of all 167 death row inmates. Against this background we must evaluate Washington's claims.

The circuit court denied both petitions, finding that Hood failed to demonstrate his innocence and that Washington failed to show that he did not voluntarily cause his own conviction. The circuit court did not credit Washington's testimony that his confession was coerced, noting inconsistencies between his evidentiary hearing testimony and his prior testimony from the 1990s. The circuit court noted that "fear of harsher sentence does not invalidate an otherwise voluntary plea" and accordingly denied Washington's petition.

Petitioner and Hood appealed the judgment denying their petitions. The State did not oppose either appeal. Although the appeals were initially consolidated, the appellate court vacated that order and issued separate opinions.

The appellate court reversed the judgment denying Hood's petition, holding that the circuit court had abused its discretion in finding that Hood had not demonstrated his innocence, had erred by *sua sponte* taking judicial notice of the trial record, and should have accepted as true Hood's uncontested testimony that he was innocent. *People v. Hood*, 457 Ill.Dec. 923, 934 (Ill. App. Ct. 1st Dist. 2021).

The appellate court affirmed the judgment denying Washington's petition. One justice dissented. The majority stated that Washington failed to demonstrate that he did not voluntarily cause his own conviction. *People v. Washington*, 186 N.E.3d 1055, 1061 (Ill. App. Ct. 1st Dist. 2021). It held that the circuit court was entitled to give whatever weight it deemed appropriate to Washington's testimony and other evidence. *Id.* at 1060. Therefore, the appellate court held that finding Washington's testimony unreliable due to his previous contradictory sworn testimony when he entered

his guilty plea was within the discretion of the circuit court. *Id.* It concluded that Washington was not entitled to a COI because his guilty plea necessarily caused his conviction, and the circuit court did not have to credit Washington's explanation for why he pleaded guilty. *Id.*

II. ANALYSIS

A

We first address the primary issue on appeal: the proper construction of Section 2-207(g) of the Code. The central question is whether a petitioner must prove by a preponderance of the evidence that his guilty plea was involuntary to obtain a COI.

Whether a petitioner is entitled to a COI is a factual finding left to the sound discretion of the circuit courts. We review such decisions only for abuse of discretion, *i.e.*, where the circuit court's decision is "arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *Rudy v. People*, 984 N.E.2d 540, 542–43 (Ill. App. Ct. 1st Dist. 2013). However, statutory construction presents a question of law that is reviewed *de novo*. *People v. Palmer*, 182 N.E.3d 672, 681 (Ill. 2021).

The fundamental goal of statutory construction is to determine and give effect to the statutory language. *People v. Reese*, 102 N.E.3d 126, 136 (Ill. 2017). Where the language of a statute is clear and unambiguous, this Court will apply the statute as written, without further aids of statutory construction. *People v. Legoo*, 178 N.E.3d 1110, 1113 (Ill. 2020).

Before construing the statute before us, we must further clarify our canons of construction. In determining the legislature's intent, we disavow any attempt to reconstruct the mental state or intentions of legislators. Even if a majority of legislators shared a collective intent when they passed a bill, to pretend that they shared a common understanding regarding how each detail should work in application would be a legal fiction. To imagine that the entire Illinois General Assembly not only agreed on the words of a statute, but also a private interpretation of those words that this Court could discern would be to defy the bounds of logic.

So, we must rely on the only means by which legislatures express their intentions: statutes. We echo the words of Chief Justice John Marshall: "The words of an instrument, unless there be some sinister design that shuns the light, will always represent the intention of those who frame it." John Marshall, *A Friend to the Union Essays*, *in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 78, 85 (Gerald Gunter, ed. 1969). Even in the interest of justice, this Court will not read into a statute exceptions, limitations, or conditions that the legislature did not express. To do so would be to rewrite a statute under the guise of statutory construction. Therefore, we will take the words of the statute as we received them from the legislature and give effect to their plain and ordinary meaning, and if the legislature should find our construction repugnant, it is always free to amend.

Now, one may ask whether this Court's cleaving to the words of a statute precludes it from considering the consequences of its construction. We do not think it does. We have always held that this Court may consider the purpose of the statute,

the problems to be remedied, and the consequences of our construction. *People v. Bradford*, 50 N.E.3d 1112, 1115 (Ill. 2016). We also presume that the legislature did not intend unconstitutional, absurd, inconvenient, or unjust results. *See People v. Williams*, 47 N.E.3d 976, 980 (Ill. 2016). What we shall not do, however, is apply a textually inconsistent or implausible interpretation merely because it comports better with our sense of justice. Chief Justice Earl Warren wrote of the U.S. Supreme Court: "[We] are bound to operate within the framework of the words chosen by Congress and not to question the wisdom of the latter in the process of construction." *Richards v. United States*, 369 U.S. 1, 10 (1962) (per Warren, C.J.). Likewise, this Court is bound to operate within the framework of the words chosen by the Illinois State Legislature and not to question its wisdom in the process of construction.

To obtain a COI, a petitioner must prove by a preponderance of the evidence the following four elements: (1) "the petitioner was convicted of one or more felonies . . . and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence"; (2) "the judgment of conviction was reversed or vacated, and the indictment or information dismissed or, if a new trial was ordered . . . the petitioner was not retried and the indictment or information dismissed"; (3) "the petitioner is innocent of the offenses charged in the indictment . . ."; and (4) "the petitioner did not by his or her own conduct voluntarily cause or bring about his or her conviction." 735 ILCS 2-207(g)(1)–(4).

Here, the parties agree that Washington has met three of the four elements required to obtain a COI under Section 2-207(g). The only point of disagreement

concerns subsection (g)(4)—whether Washington has proved by a preponderance of the evidence that he is did not "voluntarily cause or bring about his . . . conviction." *Id.* §2-207(g)(4).

Before answering the question on appeal, however, we must address a threshold issue. Here, the appellate court held that a guilty plea categorically bars a petitioner from obtaining a COI. Both parties argue that the appellate court erred, and both parties are correct. The State correctly notes that this Court has previously affirmed grants of COIs to petitioners who pleaded guilty. *E.g.*, *Palmer*, 182 N.E.3d at 675, 677. Section 2-207(g)(4) is satisfied wherever a petitioner's conviction is not brought about by his voluntary actions. One cannot voluntarily bring about a result by one's involuntary action. It follows then that a petitioner cannot voluntarily bring about his conviction by his involuntary guilty plea. Because a guilty plea can be involuntary, a guilty plea cannot categorically bar a petitioner from obtaining a COI on the basis that it voluntarily causes the conviction.

We hold that a petitioner who pleaded guilty may nevertheless obtain a COI, provided that the petitioner's guilty plea was not voluntary.

Having established that a petitioner is not categorically barred from obtaining a COI by reason of his guilty plea, we may now address the standard for voluntariness of a guilty plea.

Washington urges us to adopt the rule proposed by the dissenting justice, who stated that a voluntary guilty plea should only bar a petitioner from obtaining a COI

where that petitioner "culpably misled police or other officials." *Washington*, 186 N.E.3d at 1065 (Walker, J., dissenting).

Washington argues that the courts should not refuse COIs to petitioners who "did not contribute to their own convictions in a volitional or blameworthy manner." Washington argues that his behavior is "[f]ar from blameworthy" and that his pleading guilty was "what any rational person would have done . . . in [his] place."

The State responds that Washington's proposed rule—precluding a grant of a COI to a petitioner who pleaded guilty only if that petitioner culpably misled police or other officials—is not supported by the text of the statute. The State argues that Washington seeks to replace the word "voluntary" in the statute with "culpably." Relying on caselaw, the State seeks to show that the voluntariness of a guilty plea is not affected by whether the defendant was actually guilty.

We begin by asking what the word "voluntary" means given its plain and ordinary meaning. Black's Law Dictionary defines voluntary as "[f]ree; without compulsion or solicitation." *Voluntary*, BLACK'S LAW DICTIONARY (11th ed. 2019). Merriam-Webster's defines voluntary as, *inter alia*, as "proceeding from the will or from one's own choice or consent." *Voluntary*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (12th ed. 2019).

Dictionary definitions of "voluntary" carry no implications that an actor's decisions must be blameless or rational; rather, the definitions are concerned only with whether a person acted without compulsion. Merriam-Webster defines "culpable" as "meriting condemnation or blame especially as wrong or harmful." *Culpable*,

MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (12th ed. 2019). The definitions are not congruous, and we cannot in good conscience equate them.

Next, we turn to caselaw. The State correctly notes that a petitioner may plead guilty for a variety of reasons unrelated to his guilt. While we cannot sanction a judge accepting a guilty plea from a defendant that the judge knows to be innocent, we likewise cannot expect judges to read the hearts of defendants to ascertain the intentions behind their guilty pleas. As we explained in *People v. Reed*, "[A] decision to plead guilty may be based on factors that have nothing to do with defendant's guilt." *People v. Reed*, 182 N.E.3d 64, 72 (Ill. 2020). We have likewise stated that the plea system often devolves into a cost-benefit analysis where a defendant might plead guilty to avoid a more severe punishment, especially faced with the overwhelming probability of conviction. *Id.* Such an analysis does not, however, negate the voluntariness of a guilty plea. The U.S. Supreme Court held the same in *Brady v. United States*, where the Court held that a defendant who pleaded guilty to avoid the death penalty nevertheless pleaded voluntarily, his legitimate fear of the death penalty being imposed notwithstanding. *See Brady v. United States*, 397 U.S. 742, 755 (1970).

Here, Washington claims that he pleaded guilty following a coercive interrogation and to avoid the seventy-five-year sentence imposed on his co-petitioner, Hood. However, we cannot hold that Washington's guilty plea was involuntary based on those facts alone. Rather, Washington must demonstrate by a preponderance of the evidence that his guilty plea was not voluntary. Courts may not assign involuntariness to a guilty plea merely because the defendant feared life imprisonment. If the

legislature had intended for the benefits of obtaining a COI to extend to persons who pleaded guilty non-culpably, then it would have put such language in the statute. But we cannot read "culpably" into a statute where the legislature wrote "voluntary," so we must reject Washington's argument. Therefore, this Court holds that a petitioner who pleaded guilty and later seeks a COI must prove by a preponderance of the evidence that his guilty plea was not voluntary.

B

We next ask whether Washington ought to receive a new hearing because the circuit court did not permit him to address the prior testimony of which the court took judicial notice and failed to consider the totality of the circumstances.

Washington does not petition this Court for a new hearing; rather, he urges us to reverse the circuit court's denial and grant a Certificate of Innocence. The State argues that Washington ought to receive a new hearing for the reasons stated above. This Court will address both arguments, taking the latter first.

As we stated above, the statute entrusts the decision of whether a petitioner is entitled to a COI to the sound discretion the circuit court. This Court will review such decisions only for abuse of discretion. We do not ask whether, in our view, the circuit court ought to have granted a COI; rather, we ask whether the circuit court's decision was "arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera*, 986 N.E.2d 634, 646 (Ill. 2013). We will reverse the circuit court and grant a petitioner a COI if and only if we make such a finding.

Likewise, the circuit court was within its statutory rights to take judicial notice of Washington's prior testimony *sua sponte*. Section 5/2-702(f) states that the circuit court "*may* take judicial notice prior sworn testimony or evidence admitted in the criminal proceedings related to the convictions which resulted in the alleged wrongful incarceration. " 735 ILCS 5/2-702(f) (emphasis added). Under Rule 201(d) of the Illinois Rules of Evidence, where the decision to take judicial notice is discretionary, the circuit court may do so regardless of whether a party requests it. Ill. R. Evid. 201(d).

Courts must not grant a COI unless a petitioner has proved each element of Section 5/2-702(g) by a preponderance of the evidence. 735 ILCS 5/2-702(g). The State correctly points out that this burden must be met even where the State does not oppose a COI petition. Courts must therefore be given leeway to evaluate the facts before it, including making credibility determinations. Here, the circuit court did not err by weighing Washington's testimony and making a credibility determination based thereon.

Circuit courts, though given wide discretion is evaluating a COI petition, are not exempt from the Illinois Rules of Evidence. As the State notes, Rule 201(e) states that "a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken." Ill. R. Evid. 201(e).

Though this Court is an ardent defender of the discretion and prerogatives of the Illinois courts, we are first and foremost expositors of the law, and here the law has

been violated. The Circuit Court of Cook County relied on inconsistencies between Washington's uncontested testimony at his COI hearing and his prior testimony at his criminal trials to deny his COI petition. It did not afford Washington an opportunity to address those inconsistencies as the Rules of Evidence require. We cannot permit violations of the law, whether substantive or procedural, to stand where we are empowered to prevent it. We therefore state unequivocally that Rule 201(d) of the Illinois Rules of Evidence requires courts to allow petitioners to address material of which courts took judicial notice under 375 ILCS 5/2-207(f).

Were we to decide this case based solely on the circuit court's failure to permit Washington to address the inconsistencies between his various testimonies, we would reverse the denial of Washington's petition and remand to the circuit court for a new hearing consistent with our ruling. However, before this Court passes judgment, we must address another basis on which Washington is entitled to a new hearing.

The State argues that the Circuit Court of Cook County failed to consider the totality of the circumstances surrounding Washington's guilty plea before denying his petition. Before asking whether the circuit court failed to consider the totality of the circumstances surrounding Washington's guilty plea, however, we must ask whether the circuit court was under an obligation to do so.

Whether a circuit court is required to evaluate the totality of the circumstances in determining whether a guilty plea is voluntary is directly addressed neither in the Code nor our caselaw, however, we defer to the guidance of the U.S. Supreme Court. As the State correctly notes, the U.S. Supreme Court in *Brady* states that the

voluntariness of a guilty plea "can be determined only by considering all of the relevant circumstances surrounding it." *Brady*, 397 U.S. at 749. We agree. The purpose of Section 5/2-702(f) is to aid the court in evaluating the totality of the circumstances. We must therefore conclude that the legislature intended that the circuit courts would evaluate the totality of the circumstances in granting or denying COIs.

Here, the court denied Washington's petition because fear a harsh sentence does not invalidate an otherwise voluntary plea. Washington, however, did not claim that he pled guilty only because he feared the sentence; rather, he claimed that he was physically coerced by the police, and his testimony on this matter was unrebutted. As the State notes, we have previously stated that physical coercion by the police is a uniquely reprehensible practice that has no place in our justice system. In *People v. Wrice*, we stated that physical coercion by police "constitutes an egregious violation of an underlying principle of our criminal justice system . . . — that ours is an accusatorial and not an inquisitorial system." *People v. Wrice*, 962 N.E.2d 934, 951 (Ill. 2012) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 293 (1991) (White, J., dissenting)) (cleaned up). Where a petitioner presents credible testimony, especially unrebutted testimony, that physical coercion was involved in his guilty plea, the circuit court should have serious reservations regarding the voluntariness of that plea.

If we held that the circuit court was not required to consider the totality of the circumstances, then we would create a horrid conundrum: Washington would be prohibited from challenging the voluntariness of his confession because he pleaded guilty but would also be prohibited from challenging the voluntariness of his guilty plea

because he was coerced to confess. Such a reading of the Code would be illogical, and we will not declare that the legislature intended an illogical reading. Therefore, without denying the right of the circuit court to find that a petitioner's testimony is not credible, we hold that circuit courts must consider the totality of the circumstances in determining whether a petitioner has shown by a preponderance of the evidence that his guilty plea was involuntary under 735 ILCS 5/2-702.

C

We must now pass judgment in the case at bar. Where a petitioner has shown, as Washington has, that the circuit court failed to consider the totality of the circumstances and violated the Rules of Evidence, we would ordinarily reverse and remand for further proceedings consistent with our rulings and the Rules of Evidence. We decline to do so here.

We stated above that physical coercion by officers of the State is uniquely odious. The mere possibility of such coercion would give any court serious pause, and such courts would be obliged to inquire into whether such coercion occurred.

While no court should accept as fact anything not supported by evidence, here Washington testified that he was physically coerced by police officers, and the State did not oppose his testimony. The mere fact that the State did not contest testimony that, if true, would cast vile aspersions on its agents lends credibility to Washington's testimony. In an adversarial system, the courts, even when acting as triers of fact, ought to show disciplined restraint in questioning uncontested testimony, especially

where the State refused to participate in the entirety of the proceedings. Such silence cannot reasonably be attributed to the failure of one attorney to speak at a hearing, as a failure to object at trial might, but rather evinces a conscious decision on the part of the State to absent itself from the proceedings and allow Washington's testimony to stand unopposed. Here, the State has indicated that if Washington is granted another hearing, then it would, again, not object.

Nothing in Washington's testimony lends credence to the view that his story is fantastical or fabricated. One may reasonably expect some inconsistencies when testimony is given decades apart, especially where physical coercion is involved, as it likely is here.

We find that Wayne Washington has demonstrated by a preponderance of the evidence that his guilty plea was involuntary. Thus, the Circuit Court of Cook County's denial of Washington's petition was arbitrary. Considering Washington's uncontested testimony, no reasonable person, much less a judge bound to respect the fundamental principles on which our adversarial system is built, could conclude that Washington has not met his burden of proof. Our adversarial system is not rendered inquisitorial merely because a judge is given the power to take judicial notice *sua sponte*. Had the State cross-examined and impeached Washington, we would likely remand the case for further proceedings based solely on the circuit court's failure to comply with the Rules of Evidence. But that is not the situation here. Washington has met his burden of proof and he is entitled to a Certificate of Innocence.

III. CONCLUSION

For the foregoing reasons, the judgments of the circuit and appellate courts are reversed. We remand to the Circuit Court of Cook County with instructions to grant Wayne Washington a Certificate of Innocence pursuant to 735 ILCS 2-702(h).

SO ORDERED.

Applicant Details

First Name	**Rachel**
Last Name	**Sandor**
Citizenship Status	**U. S. Citizen**
Email Address	**rachel.sandor@uconn.edu**
Address	**Address** **Street** **2 Sail Harbour Drive** **City** **Sherman** **State/Territory** **Connecticut** **Zip** **06784** **Country** **United States**
Contact Phone Number	**9148443907**

Applicant Education

BA/BS From	**Skidmore College**
Date of BA/BS	**June 2021**
JD/LLB From	**University of Connecticut School of Law** **https://www.law.uconn.edu/**
Date of JD/LLB	**May 22, 2024**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**Connecticut Journal of International Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Semi-Finalist of William H. Hastie Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Blank, Diana
diana.blank@uconn.edu
646-266-5233

D'Alessio, Christie
cdalessi@nycourts.gov

Bauer, Jon
jon.bauer@uconn.edu
860-570-5205

This applicant has certified that all data entered in this profile and any application documents are true and correct.

2 Sail Harbour Drive
Sherman, CT 06784

June 7, 2023

The Honorable Stefan R. Underhill
United States District Court, District of Connecticut
915 Lafayette Boulevard, Suite 411
Bridgeport, Connecticut 06604

Dear Judge Underhill:

As an incoming third-year student at the University of Connecticut School of Law, I am writing to apply for a judicial clerkship in your chambers. The opportunity to learn and support the work of your chambers as a clerk would be an honor, as it is my primary goal to continue learning about the court system and litigation through a judicial clerkship, and I am eager to begin my law career in the District of Connecticut.

My skill set and experience give me confidence that I would be successful in this role. As a law student, I have served as a judicial intern in the United States District Court, in the District of Connecticut, and twice in state court. My experience as a judicial intern began during my undergraduate career, when I worked with Judge Minihan. During this internship, I observed the court's criminal proceedings, and took part in progressive initiatives such as the Mental Health Court. I also gained court experience through an undergraduate internship at a District Attorney's Office. During my first summer as a law student, I interned for New York State Supreme Court Justice Christie D'Alessio. There, I had the opportunity to make concrete contributions to the judge's cases by conducting research on novel and complex legal issues, assisting with the writing and editing of decisions, and supporting the judge in daily proceedings. Most recently, I served as a judicial intern for Judge Victor A. Bolden in the United States District Court, further enhancing my research and writing skills with assignments for pending federal cases.

During my second year of law school, I participated in the Asylum and Human Rights Clinic, where I served as an advocate for clients seeking asylum in the United States. Through this experience, I gained transferable skills, including enhanced abilities to review the facts of a case, conduct effective legal research and writing, communicate with clients, compile strong evidentiary material, and present an oral argument. During this past year, I also had the opportunity to advance my skills in research, writing, and oral advocacy through the William H. Hastie Moot Court Competition, where I was a semi-finalist. For my 2L summer, I will be interning with the Commission on Human Rights and Opportunities, where I hope to continue improving my legal research, legal writing, and litigation skills while working on discrimination cases.

Through all my legal experiences, I acknowledge the differences between the roles of advocate versus judge and clerk. Given the opportunity, I will take these experiences and skills with me thoughtfully into a judicial clerkship.

Thank you in advance for your time and consideration of my application.

Sincerely,

Rachel Sandor

RACHEL SANDOR
2 Sail Harbour Drive, Sherman, CT 06784
Email: rachel.sandor@uconn.edu Phone: (914)844-3907

EDUCATION

University of Connecticut School of Law, Hartford, CT
Juris Doctor Expected, Graduate Certificate in Human Rights, May 2024
GPA: 3.65, Ranked 24/137, Top 18%

Journal: Connecticut Journal of International Law
Lead Article Editor (Spring 2023-Spring 2024), Associate Editor and 2L Representative on the Write-On Committee (Fall 2022-Spring 2023)

Activities: Moot Court Competition Semi-Finalist (Fall 2022), Moot Court Board Member, International Refugee Assistance Project

Skidmore College, Saratoga Springs, NY
Bachelor of Arts, *cum laude*, in History and Spanish, May 2021
GPA: 3.65

Honors: Skidmore College Dean's List (Fall 2019, Spring 2020, Fall 2020, Spring 2021)
Activities: Skidmore in Spain Study Abroad Program (Fall 2019), member of the Senior Inter-Class Council of Skidmore Student Government Association, recruited NCAA athlete on Skidmore College Division III Women's Lacrosse Team

LEGAL EXPERIENCE

Commission on Human Rights and Opportunities, Hartford, CT
Legal Division Intern, May 2023—Present

- Responsible for leading proceedings for employment discrimination and housing discrimination cases, including mediations, investigations, and reconsiderations
- Performs thorough legal research and writing on novel issues for cases that are pending in the agency and in court
- Creates robust reports on various topics in discrimination law for the Connecticut General Assembly to consider in their deliberations during the legislative session

Madsen, Prestley, & Parenteau, Hartford, CT
Legal Intern, June 2023—Present

- Prepares comprehensive memoranda of law analyzing case law on new and unique legal issues that arise in the firm's employment discrimination cases

United States District Court, District of Connecticut, Bridgeport, CT
Judicial Intern, January 2023—May 2023

- Conducted legal research and drafted decision on pending motions for Judge Bolden and law clerks to use in connection with ongoing and daily proceedings, including a decision on a motion to vacate or correct a sentence
- Developed litigation skills by attending various proceedings, including high-profile criminal trials, civil trials, and oral arguments for pending motions

The University of Connecticut Asylum and Human Rights Clinic, West Hartford, CT
Legal Intern, August 2022—December 2023

- Advocated on behalf of clients seeking asylum in the United States
- Spearheaded the process for completing asylum applications, which included interviewing clients, investigating facts to support their claim, researching human rights conditions in their home countries, preparing supporting documentation, writing legal briefs to accompany their materials, and performing a closing argument at their asylum interview

New York State Supreme Court, Dutchess County, Poughkeepsie, NY
Judicial Intern, June 2022—July 2022

- Conducted legal research on a wide variety of issues related to Judge D'Alessio's proceedings and decisions, including research on New York State Medicaid reimbursement methodology, automobile accident cases, and matrimonial matters
- Observed legal proceedings throughout the courthouse, including civil trials, criminal trials, and special hearings
- Attended proceedings in a variety of courts throughout New York including the New York Supreme Court in Westchester County and Family Court

Office of the Westchester County District Attorney, White Plains, NY
Legal Intern, July 2019—August 2019

- Attended proceedings in the Westchester County Criminal Courts, including arraignments, trials, and sentencing hearings.
- Supported the District Attorney and Assistant District Attorneys during press conferences by scribing meeting notes
- Worked directly with Assistant District Attorneys and Communications Office to provide community outreach through press releases, the official website, and social media

Westchester County Courthouse, White Plains, NY
Judicial Intern, June 2018—July 2018

- Shadowed county judge in the Westchester County Criminal Courts and the Town of Greenburgh Courthouse, observing legal conferences, trials, jury selection, and various proceedings
- Worked closely with the Mental Health Court, which assists in the rehabilitation of criminals suffering from mental illness
- Participated in educational visitation programs at correctional facilities, interviewing current inmates and fostering meaningful discussions regarding the sentencing process and the prison system

NON-LEGAL WORK EXPERIENCE
Skidmore College Admissions, Saratoga Springs, NY
Student Advisor, May 2019—May 2021

- Responsible for providing guidance, insight, and outreach to prospective students and their families

SKILLS AND INTERESTS

- Proficiency in Westlaw, Lexis Nexis, Microsoft Office Suite, Google Suite, and social media platforms
- Highly proficient in Spanish
- Volunteering: Saratoga Bridges (2017-2019), Saratoga youth sports organizations (2017-2019), Backyard Sports (2015-2016)

UCONN
SCHOOL OF LAW

Gregory Bouquot,
University Registrar

University of Connecticut
Hartford, Connecticut 06105-2290

May 30, 2023
Page 1 of 2

Name : Rachel Sandor
Student ID : 2936343
Birthday : January 05
CEEB : 3915

Rachel Sandor

- - - - - - - - - - - - Academic Program History - - - - - - - - - - - - - -

Program : Juris Doctor 3 Yr. Day
2021-03-01 : Active in Program
2021-03-01 : Law - JD Day Division Major

Beginning of Law Record

Fall 2021 (2021-08-30 to 2021-12-21)

Course		Description	Credits	Grade
LAW	7500	Civil Procedure	4.00	B+
Instructor	:	Alexandra Lahav		
LAW	7505	Contracts	4.00	B+
Instructor	:	Peter Siegelman		
LAW	7510	Criminal Law	3.00	B+
Instructor	:	Susan Schmeiser		
LAW	7518	Lgl Practice: Rsrch & Writing	3.00	B+
Instructor	:	Maureen Johnson		
LAW	7530	Torts	3.00	B+
Instructor	:	Carleen Zubrzycki		

Semester GPA : 3.300 Semester Totals : 17.00
Cumulative GPA : 3.300 Cumulative Totals : 17.00

Spring 2022 (2022-01-18 to 2022-05-12)

Course		Description	Credits	Grade
LAW	7519	Lgl Practice: Negotiation	1.00	P
Instructor	:	Jessica Rubin		
LAW	7520	Lgl Practice: Intrv,Cnsl & Adv	3.00	A-
Instructor	:	Richard Luedeman		
LAW	7525	Property	4.00	A-
Instructor	:	Nadiyah Humber		
LAW	7540	Constitutional Law, An Intro	4.00	A-
Instructor	:	Mathilde Cohen		
LAW	7655	Employment Discrimination Law	3.00	A-
Instructor	:	Jon Bauer		

Class rank: 2nd Quintile (3.519-3.258)

Semester GPA : 3.700 Semester Totals : 15.00
Cumulative GPA : 3.481 Cumulative Totals : 32.00

Summer 2022

Course		Description	Credits	Grade
LAW	7499	Rank/Quintile Statistics	0.00	

Class rank: 2nd Quintile (3.481-3.255)

Semester GPA : 0.000 Semester Totals : 0.00
Cumulative GPA : 3.481 Cumulative Totals : 32.00

Fall 2022 (2022-08-29 to 2022-12-21)

Course		Description	Credits	Grade
LAW	7609	Clinic: Asylum and Human Rts.	4.00	A
Instructor	:	Jon Bauer		
LAW	7610	Clinic: Asy/Hum Rights Field	5.00	A
Instructor	:	Jon Bauer		
LAW	7645	Criminal Procedure	3.00	A-
Instructor	:	Leonard Boyle		
LAW	7982	Legal Spanish I	2.00	A
Instructor	:	Susana Bidstrup		

Semester GPA : 3.936 Semester Totals : 14.00
Cumulative GPA : 3.622 Cumulative Totals : 46.00

Spring 2023 (2023-01-17 - 2023-05-11)
Elected to Membership: CT Moot Court Board

Course		Description	Credits	Grade
LAW	7565	Legal Profession	3.00	B+
Instructor	:	Leslie Levin		
LAW	7814	Refugee Law	3.00	A
Instructor	:	Jon Bauer		
LAW	7979	Field Placement: Indiv Seminar	1.00	A
Instructor	:	Rachel Reeves		
LAW	7983	Legal Spanish II	2.00	A
Note	:	*Awarded the CALI Excellence Award for class performance.*		
Instructor	:	Susana Bidstrup		
LAW	7996	Field Placement: Individual	3.00	P
Note	:	*Site: United States District Court, District of Connecticut, Hon. Victor A. Bolden*		
Instructor	:	Rachel Reeves		

Class rank: 1st Quintile (24/137)

Semester GPA : 3.767 Semester Totals : 12.00
Cumulative GPA : 3.646 Cumulative Totals : 58.00

UCONN
SCHOOL OF LAW

Gregory Bouquot,
University Registrar

University of Connecticut
Hartford, Connecticut 06105-2290

May 30, 2023
Page 2 of 2

Name : Rachel Sandor
Student ID : 2936343
Birthday : January 05
CEEB : 3915

Fall 2023 (2023-08-28 to 2023-12-17)

Course	*Description*	*Credits*	*Grade*
LAW 7360	Diversity/Inclusion Lgl Prof	0.00	
Instructor :	Karen Demeola		
	Tanya Johnson		
LAW 7560	Evidence	0.00	
Instructor :	Leslie Levin		
LAW 7657	Family Law	0.00	
Instructor :	Susan Schmeiser		
LAW 7675	Principles of Insurance	0.00	
Instructor :	Jill Anderson		
LAW 7773	Employment Law	0.00	
Instructor :	Sachin Pandya		

Semester GPA :	0.000	Semester Totals :	0.00
Cumulative GPA :	3.646	Cumulative Totals :	58.00

Law Career Totals

Cumulative GPA :	3.646	Cumulative Totals :	58.00

End of Official Transcript UCONN School of Law

UNIVERSITY OF CONNECTICUT 1881

University of Connecticut School of Law Key to Official Transcript

Credits awarded by the University of Connecticut School of Law are determined in accordance with American Bar Association Standards and U.S. Department of Education Regulations which establish the minimum requirements for the awarding of credit. The academic calendar is based on a fifteen-week semester.

Calculation of Grades

Cumulative grade point averages are calculated by the following formula: grade points multiplied by course credits. This equals course grade points. Total course grade points divided by total number of credits in graded courses equals the grade point average.

Grades	Grade Points
A	4.0
A-	3.7
B+	3.3
B	3.0
B-	2.7
C+	2.3
C	2.0
C-	1.7
D+	1.3
D	1.0
D-	0.7
F	0.0

This key reflects the grading system in current use. From the mid-1960's through 1997-1998, the following grading system was used:

A (4.0), B+ (3.5), B (3.0), C+ (2.5), C (2.0), D+ (1.5), D (1.0), F (0.0).

Ranking

Juris Doctor students are ranked once annually, at the end of the academic year, with the exception of first year full-time Juris Doctor students. These students are ranked at the end of their 1L year and again prior to the start of their 2L year to reflect rank after student attrition is determined. Students are grouped by year and division when rank is done. Students in the top quintile are ranked numerically by grade point average. All others are ranked only in quintile groups. Grades or grade corrections received after the completion of rank will not change the student's class rank for the year.

Non-calculable and Temporary Grades

AU	Audit	The privileges of an auditor are limited to attendance. No course work is required of an auditor thus no evaluation of the auditor is done by the course instructor. The award of a grade AU indicates only sufficient attendance in the course.
HP	High Pass	A high pass grade indicates that a student has performed at a level equivalent to a C or better but at a level higher than a Pass.
P	Pass	A pass grade indicates that a student has performed at a level equivalent to a C or better.
LP	Low Pass	A low pass grade indicates that a student has performed at a level equivalent to a C or better but at a level less than a Pass.
I	Incomplete	Student has received instructor permission to extend the deadline to complete course work thus the grade is not yet available to be posted.
	Blank	The grade was not yet submitted at the time of transcript printing. This may be that the deadline for course work completion and submission of grades has not yet passed, or that the course extends greater than the length of one semester and the grade is not awarded until the completion of work.

Administrative Grades

N	No Grade Submitted	A grade of N is placed on a student transcript when the student has not met the attendance requirements sufficient to permit the student to sit for the examination or otherwise be evaluated. The grade is not used in the calculation of the grade point average.
Dropped Courses		A Grade of W (for Withdrawal) is not noted on student transcripts. Courses dropped by the student without permission required if within the add/drop period, or with approval if outside the add/drop period do not appear on the transcript.

Honors

The Juris Doctor degree may be conferred with Honors, with High Honors, or with Highest Honors.

Since 1992, Honors are granted to graduating Juris Doctor students using a percentage system. Highest Honors are awarded to the top 1% of the graduating class; High Honors are awarded to the next 5% of the graduating class; and Honors are awarded to the next 24% of the graduating class. For purposes of determining honors recipients, day and evening division graduates are combined.

From 1977-1991, Honors were granted to graduating students using a grade point average system. Highest Honors were awarded to graduating Juris Doctor students with a grade point average of 3.700-4.000; High Honors were awarded with a grade point average of 3.500-3.699 and Honors were awarded with a grade point average of 3.200-3.499.

In accordance with the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 CFR Part 99, you are hereby notified that this information may not be further disclosed except as permitted under FERPA. See 34 C.F.R. 99.33(a). Additionally, alteration of this transcript may constitute a criminal offense or other violation of law.

Accreditation

The University of Connecticut School of Law is accredited by the American Bar Association and is a member of the Association of American Law Schools.

The University of Connecticut School of Law is located in Hartford, Connecticut.

Last Revised - April 2021